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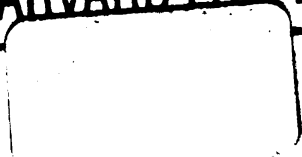
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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

FEBRUARY 4, 1905—MARCH 29, 1905

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON
DURING THE PERIOD COVERED IN THIS VOLUME

HON. WALLACE MOUNT, CHIEF JUSTICE

HON. RALPH O. DUNBAR

HON. HIRAM E. HADLEY

HON. MARK A. FULLERTON

HON. FRANK H. RUDKIN

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JUDGES

OF THE

SUPERIOR COURTS OF WASHINGTON

During the Pendency Therein of the Cases Reported in this Volume.

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* Term expired January, 1903.

† Term commenced January, 1903.

‡ Elected for short term, November 8, 1904 to January 11, 1905.

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CASES

DETERMINED IN THE

SUPREME COURT

OF .

WASHINGTON

[No. 4841. Decided February 4, 1905.]

WATSON C. SQUIRE *et al.*, Respondents, v. MARGARET
SIDNEY, Appellant.¹

APPEAL AND ERROR—TIDE LAND CONTEST—QUESTION AS TO FILES OF LAND COMMISSIONER'S OFFICE—REVIEW. Under the statute directing a trial *de novo* of questions involving the right to purchase tide lands, upon appeal from the board of state land commissioners, the superior court cannot, on such an appeal, review a decision of the board as to what are the proper records in the case, made in a proceeding instituted by one of the parties pending the appeal, whereby the board refused to correct the record.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 12, 1902, on granting a motion for judgment upon the pleadings and a stipulation, affirming an order of the board of state land commissioners awarding the prior right to purchase tide lands. Affirmed.

Sachs & Hale, for appellant.

L. T. Turner, for respondents.

FULLERTON, J.—On March 26, 1895, the appellant filed with the commissioner of public lands her application to purchase lots 5 and 6, in block 203, of the tide lands in

¹Reported in 79 Pac. 469.

front of the city of Seattle, basing her right on the ground, as recited in the application now on file in the office of the commissioner of public lands, that she was an abutting upland owner. On April 27, 1895, the respondents filed an application to purchase lot 6 of the land applied for by the appellant, basing their right, also, on the ground that they were abutting upland owners.

When these applications came on to be heard before the board of state land commissioners, the parties stipulated that they would take their evidence before a stenographer, have the same reduced to writing, and submit their respective claims for the determination of the board on written evidence. This evidence was taken and returned to the board on December 6, 1897; and on December 27, following, the board decided that the prior right to purchase was in the respondents, as owners of the abutting upland, rejecting the application of the appellant "for the reason that the said improvements, placed upon said lot by her, are not such as come under the rule laid down by the supreme court as being required for 'commerce, trade or business.' " Appeal to the superior court of King county was taken from the decision, on January 11, 1898.

Subsequent to the taking of the appeal, and for the purpose of facilitating the trial before the superior court, the parties entered into a stipulation, to be used as evidence, in which, among other things, it was agreed that the respondents were the owners of the upland land abutting upon the lot in dispute, holding the same by certain mesne conveyances from the patentee of the government of the United States. The cause was called for trial on June 5, 1901. In his opening statement to the jury, the attorney for the respondents stated that he would object to any testimony on the part of the appellant, for the reason that she was claiming as an upland owner, and had entered into

Feb. 1905.]

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a stipulation to the effect that the respondents were upland owners of the property they sought to purchase. The counsel for the appellant, who, it seems, was not the one who had appeared before the commissioners, then examined the application, and, finding it to be as described by the respondents' counsel, moved for a continuance in order to enable him to supply the record, contending that the copy of his client's application, contained in the record sent from the land commissioner's office, was incorrect. After some contention, a continuance was agreed upon, and assented to by the court. The agreement was reduced to writing, and is as follows:

"It is hereby stipulated that this cause may be continued ten days. If atty. for appellant shall not, on or before said time, procure and file herein certified copy of an original application of appellant, Margaret Sidney, filed with the state land commissioner within the sixty days allowed by law for such filing, applying to purchase the lands in controversy upon the ground that she was on March 26, 1890, an improver and user thereof under the laws of this state, judgment shall, at expiration of said ten days, be entered for respondent Watson C. Squire, adjudging him to be entitled to purchase said tide lands from the state of Washington, and for costs. If said certified copy shall be filed, said cause shall be set down for trial at some day in the future convenient to court and parties."

On June 15, 1901, no new certified copy having been filed, the respondents moved for judgment on the stipulation. This motion was resisted, the appellant claiming that her original application had been withdrawn from the files in the land commissioner's office, and a forged copy substituted in its stead. Thereupon the court overruled the motion for judgment, continuing the case in order to give the appellant an opportunity to have the record corrected by the board of state land commissioners. The appellant thereupon instituted a proceeding before that board,

asking a correction of the record in accordance with her claims, and a hearing was had thereon, which resulted in a dismissal of the proceeding.

The cause next came on for hearing before the superior court on November 5, 1902, when the respondents again moved for judgment on the stipulation. This motion was also resisted by the appellant, her counsel contending that she had the right to re-try, before the court, the question whether or not her original application to purchase had been withdrawn from the office of the commissioner of public lands, and a false and forged one substituted in its stead. The court ruled against the appellant, and entered a judgment for the respondents pursuant to the stipulation. This appeal is from the last mentioned judgment.

While the appellant assigns a number of errors, we think the whole issue is involved in the question, did the court err in refusing to allow the appellant to try *de novo* the question whether her original application to purchase had been taken from the files of the land commissioner's office, and a forged one substituted in its stead? This question, we think, must be answered in the negative. The statute, it is true, allows an appeal to the superior court from any decision of the board of land commissioners which involves the question of prior right of purchase of tide land, and provides that, after the record has been certified to the superior court, that court shall try the case *de novo*, as if originally commenced in such court. But this has reference to questions of fact—the issues of fact between the parties raised by their respective contentions; it does not give the court power to determine between the applicant and the board what papers are, and what are not, files in the office of the commissioner of public lands. It may be that the appellant is entitled to review the ruling of the board on this matter in the courts, but that is not the question be-

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Citations of Counsel.

fore us. She is attempting to do it on an appeal from a ruling of the board determining which of two adverse claimants to tide land has the prior right of purchase, and this we hold she cannot do.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4820. Decided February 4, 1905.]

THOMAS SCOTT, *Respondent*, v. FRANK HANFORD,
Appellant.¹

JUDGMENTS—VACATION—ATTACK BY MOTION—LIMITATION—FAILURE TO DENY ALLEGATION. A motion to vacate a judgment valid on its face, for alleged want of service of process, must be denied when it was not filed until after the statutory period for such an attack, and the failure to deny the allegation as to want of service does not warrant the granting of the motion.

Appeal from an order of the superior court for King county, Tallman, J., entered March 14, 1903, denying defendant's motion to vacate a judgment entered April 19, 1897. Affirmed.

Eskridge & Watrous, for appellant. A void judgment may be set aside at any time on motion. *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858; *Spokane & Idaho Lum. Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446; *Manufacturers' etc. Bank v. Boyd*, 3 Denio 257; *Dederick's Adm'r v. Richley*, 19 Wend. 108; *Lee v. O'Shaughnessy*, 20 Minn. 173; *Du Bois v. Clark*, 12 Col. App. 220, 55 Pac. 750. The judgment was absolutely void for want of any service of process. *Allen v. McFentyre*, 56 Minn. 351, 57 N. W. 1060; *Heffner*

¹Reported in 79 Pac. 481.

v. Gunz, 29 Minn. 108, 12 N. W. 342; *Hanson v. Hanson* (Cal.), 20 Pac. 736. A motion is a direct attack and may be based on defects *de hors* the record. *Johnson v. Gregory*, 4 Wash. 109, 29 Pac. 831, 31 Am. St. 907. The vacation of a void judgment is a matter of right. *Heffner v. Gunz*, *supra*; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123. Lapse of time is not ground for denying the motion. *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. 922; *People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. 448; *Wolferman v. Bell*, 8 Wash. 140, 35 Pac. 603; *Brooks v. Lewis*, 22 Wash. 192, 60 Pac. 121; *Allen v. McIntyre*, *Lee v. O'Shaughnessy*, and *Heffner v. Gunz*, *supra*.

E. J. Grover and *Harrison B. Martin*, for respondent, contended, *inter alia*, that the judgment could not be attacked by motion after the lapse of one year. Bal. Code, § 5155; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724.

FULLERTON, J.—On April 19, 1897, in the superior court of King county, the respondent recovered judgment against C. T. LeBallister and the appellant, Frank Hanford, for the sum of \$516.48, due upon a promissory note executed by the judgment debtors in favor of the respondent. The judgment was entered by default, on a return made by the sheriff showing personal service on both of the defendants, in King county. The judgment remained on the records uncollected until December 24, 1902, when the respondent began proceedings to revive the same, causing notice of his application to be served upon the appellant, Hanford. Hanford filed an answer to the application to revive, which was stricken by the court on motion of the respondent. Thereupon he filed a motion to vacate the

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original judgment on the ground that no service of summons in that action had been made upon him, supporting his motion by his own affidavit to the effect that the sheriff's return, citing such service, was false. This motion the trial court denied, and he appeals from that ruling.

The appellant argues that, inasmuch as there was no denial of his allegation to the effect that no personal service was made on him in that action, his statement in that regard must be taken as true, and, being true, it conclusively appeared that the judgment was void for want of jurisdiction, and the court should have granted his motion to vacate and set it aside. But this is not the rule. The appellant cannot attack the judgment in this way. Where it appears on the face of the record that no service has been made on the defendant, and the court must know, from a bare inspection thereof, that the judgment is void for want of jurisdiction over the person of the defendant, it will set aside the judgment, on the motion of the defendant or of any one injuriously affected by it; but, when the judgment is valid on its face, it is not thus subject to attack. To set aside a judgment for matters *de hors* the record, it must be attacked by some one of the statutory methods for the vacation of judgments, and within the time limited by statute, or by a suit setting up some equitable ground for its vacation. A motion, supported by affidavit, filed more than five years after the entry of the judgment, is not such an attack; and the court in this instance did not err in refusing to consider the motion filed by the appellant. The order appealed from is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5451. Decided February 4, 1905.]

ARTHUR W. COATS, *Appellant*, v. SEATTLE ELECTRIC
COMPANY, *Respondent*.¹

APPEAL AND ERROR—BRIEFS—STRIKING OUT. A brief referring to the trial judge in grossly discourteous language will be struck out on motion, with leave to file a proper brief within thirty days.

Motion to strike appellant's brief and affirm the judgment. Motion to strike granted.

Wooten & Welch, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

PER CURIAM.—This is a motion to strike the appellant's brief, for the reason that it refers to the trial judge in language grossly discourteous, unprofessional, scandalous, and impertinent. An examination of the brief convinces us that the language used is properly described in the motion to strike. We deem it unnecessary to quote the language, or to make further comment. Counsel should know their rights and their duties as officers of the court without lectures or admonitions from us. We trust the striking of the brief will be a sufficient penalty for the breach of professional duty complained of, and that the offense will not be repeated. The appellant is allowed thirty days in which to file a proper brief. The brief of the respondent may stand, or counsel may, at their option, file a further brief.

¹Reported in 79 Pac. 484.

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[No. 4771. Decided February 6, 1905.]

F. E. WOMER, *Appellant*, v. W. F. O' BRIEN, *Respondent*.¹

FISHERIES—LOCATION OF TRAPS—VALIDITY—EXPIRATION OR ABANDONMENT OF PRIOR LOCATION. Where a fish trap location is originally invalid because of a prior conflicting one, it does not become valid upon the expiration, nor by the abandonment, of the prior location.

SAME—ABANDONMENT OF SITE. Under Laws 1899, p. 203, § 9, a trap location is not abandoned fifteen days before the expiration of the license, because of failure to construct a trap at that time, when the fishing season covered by the license had not expired at that time.

SAME—INJUNCTION—PARTIES—WAIVER OF OBJECTION. In an action to enjoin the construction of a fish trap upon a location alleged to have been abandoned by the owner, the plaintiff can not show, upon its appearing that the location was not abandoned, that a third party was the real owner of the location, after having proceeded against the defendant as the owner thereof.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered April 14, 1903, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing an action for an injunction. Affirmed.

Kerr & McCord, for appellant.

Quinby & Wells, for respondent.

HADLEY, J.—This suit involves a controversy between the claimants of two fish trap locations. In the year 1900 the plaintiff, Womer, established a pound net fishing location in the waters of Puget Sound, near the entry into Lopez Pass, in San Juan county. The location extended in an easterly direction from the shore line, and was held under license No. 2565, issued to appellant by the fish commis-

¹Reported in 79 Pac. 474.

sioner of the state of Washington. After the establishment of the location, and in the month of April, 1901, the plaintiff constructed a pound net or fish trap thereon. Subsequently an action was commenced by Fidalgo Island Canning Company and others, against this plaintiff, and such proceedings were thereafter had that this plaintiff was, by injunction, compelled to cut off about four hundred and fifty feet of the outer end of said location, and was compelled to move the pot and hearts of his trap in shore, about the distance above named.

During the season of 1901 the plaintiff operated his trap at said location, at the point to which the same was removed under the mandatory injunction of the court. Plaintiff alleges that, during all of said time and down to the present, he has substantially maintained a pile at the outer end of his said location, at practically the same point where it was originally driven in the year 1900; that the said No. 2565 was continuously maintained upon said outer pile, until just prior to the expiration of said license, when the number of a new license held by plaintiff was posted thereon.

The above mentioned action of the Fidalgo Island Canning Company and others, against the plaintiff, was instituted upon the ground that said location 2565 infringed upon a location lying to the northeasterly of the outer end of location 2565, said northeasterly location being then identified by a pound net license No. 1766. At the time of the trial of that case, it was found by the court that the six hundred feet end passageway between 2565 and 1766 was infringed upon, and partially closed, by 2565, and that 1766 was the older location in point of time. For said reason the plaintiff was enjoined and required to cut off a portion of his location as aforesaid. On appeal to this court, that holding of the trial court was affirmed. See *Fidalgo*

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Island Canning Co. v. Womer, 29 Wash. 503, 69 Pac. 1121.

By that decision, location 1766 was determined to be a valid one, upon which the plaintiff here was then encroaching by the outer end of his location 2565. But he alleges in this action, that afterwards the holder of 1766 abandoned that location; that no fishing appliances were constructed thereon during the fishing season covered by the license numbered 1766. That license expired August 4, 1901, and the plaintiff alleges that on July 20, 1901, he had knowledge that said location had been abandoned by its holder, and that plaintiff thereupon extended his location, identified by license No. 2565, outward from the shore toward the east, a distance of about four hundred and fifty feet, and established a location thereon as a part of his existing one, and posted his license No. 2565 upon the outer pile of his extended location. He further alleges, that he is engaged in the construction of a pound net or fish trap upon his said location, which he intends to operate during the season of 1902; that, by reason of the abandonment of 1766, the waters theretofore held by that number became open, and that at said time the plaintiff's location 2565 became the only one in that vicinity, thereby removing any infringement by it upon the location of 1766, as such infringement existed when the case of the Fidalgo Island Canning Company aforesaid was tried.

This action was brought by plaintiff to enjoin the respondent from constructing a trap upon the location which was formerly identified by number 1766, but which is now claimed by respondent under a later license number. The cause was tried by the court, and resulted in a judgment denying the injunction, and dismissing the action. The plaintiff has appealed.

It will be observed from the foregoing statement that

appellant claims a right to that portion of location 2565 which, by the result of the former litigation mentioned, he was required to cut off. He was required to reduce the length of his location because it conflicted with the very one against which he now contends. He bases his present claim upon the ground that the other location was abandoned after the former suit was tried, and that he thereupon made good his location upon that portion he had been required to cut off. He contends that, when he extended his location on July 20, 1901, he intended it as a new location of that much of his trap site, and not simply to preserve rights which he claimed to have by virtue of his first location. The court found the reverse, and we think the finding is supported by the evidence. Under that finding appellant was attempting to hold by virtue of his original location, which, as we have seen, was determined in the former litigation to be invalid, so far as this conflicting portion is concerned, because of the prior location of the other site in controversy here. The original location being invalid when made, because of a prior conflicting one, it could not ripen into a valid location at the expiration of the license for the prior one, under the decision in *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003.

Assuming, however, that it may be true that appellant, when he extended his location notice to the outer point, on July 20, 1901, did not intend his act as a mere preservation of rights under the first location, but did intend it as a new and independent location, what then are his rights? It will be remembered that the license under which number 1766 was held did not expire until August 4, 1901, fifteen days after appellant's attempted extension of his location. Number 1766 was still a live location. The court found that it was not abandoned, and we think the finding was justified. It is true, the holder had a short time before ceased driving trap piles at the location, but there yet

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remained fifteen days of the license period within which construction could be carried on without any right of interference from any one. Under Laws 1899, p. 203, § 9, it is provided that a locator who fails to construct his fishing appliance during the fishing season covered by his license shall be deemed to have abandoned the location. There is no evidence here showing that the fishing season covered by license 1766 had expired on July 20, when appellant attempted to extend his location. The license period under 1766 was still running, and, unless the fishing season had expired, the location cannot be held to have been abandoned merely because a fishing appliance had not been constructed prior to that time. Therefore, even though it should be held here, with appellant's contention, that the lower court should have found that appellant's intention on July 20 was to make a new location as of that date, it nevertheless follows that such new location was made while the older conflicting one was still in force. Any claim of abandonment of the older location after that time is ineffectual, for the reason that such subsequent abandonment would not have validated appellant's new location, since the latter was invalid when made. *White Crest Canning Co. v. Sims, supra.* Appellant's claim for relief relates back to, and is founded upon, his attempted location of July 20, 1901, and we think the denial of the injunction was not erroneous.

It is assigned that the court erred in refusing to admit evidence to show that the Fidalgo Island Canning Company was the real owner of the location sought to be enjoined. We think the evidence was properly refused. Appellant had sued respondent, and not the Canning Company, as the holder of the location.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5408. Decided February 6, 1905.]

LINCOLN COUNTY, *Respondent*, v. JACKSON BROCK,
Appellant.¹

EMINENT DOMAIN—APPROPRIATION BY COUNTY FOR HIGHWAY—DAMAGES—OFFSETTING BENEFITS—COUNTIES—MUNICIPAL CORPORATIONS. In a proceeding to appropriate lands for a county road, benefits accruing to the defendant's land by the establishment of the highway may be offset against the damages for the land taken, since a county is a municipal corporation within the exception of Const., art. 1, § 16.

DAMAGES—VERDICT—EXACT AMOUNT TENDERED. No inference can be drawn against sustaining a verdict for the value of land because the same is in the exact amount tendered, where the court instructed the jury that, by reason of said tender, no less amount could be allowed.

Appeal by defendant from a judgment of the superior court for Lincoln county, Neal, J., entered May 19, 1904, upon the verdict of a jury assessing damages for the value of land, after a trial on the merits in a condemnation proceeding. Affirmed.

Myers & Warren, for appellant, cited: *People v. McFadden* (Cal.), 22 Pac. 854; *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730; *Dillon, Mun. Corp.* (2d ed.), § 10; *Com'rs of Hamilton County v. Mighels*, 7 Ohio St. 109; *Williamsport v. Commonwealth*, 84 Pa. St. 487, 24 Am. Rep. 208; *Schweiss v. District Court*, 23 Nev. 226, 45 Pac. 289.

R. M. Dye, for respondent.

CROW, J.—This action was brought by Lincoln county, for the purpose of condemning certain real estate for a public road. The jury assessed appellant's damages at

¹Reported in 79 Pac. 477.

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\$202.25, the exact amount which theretofore had been tendered by the county, and refused by appellant. Judgment of condemnation was made and entered, and this appeal is taken therefrom.

Appellant's first assignment of error is that the court erred in giving the following instruction to the jury:

"In estimating defendant's damages, you may take into consideration the difference, if any, between the value of the defendant's land after the highway is appropriated and built, as compared with its value before; and if the jury finds that defendant's land will be actually benefited by the construction of said proposed highway, you should offset such benefit against any damages which you may find."

Appellant's main contention for a reversal is based on the above instruction, he claiming that no benefits, accruing to appellant's land on account of the proposed establishment of the highway, should be offset against any damages the jury might find. Section 16, art. 1, of our state constitution, provides:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of *any corporation other than municipal* until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law."

Appellant practically concedes that, under the holdings of this court in *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794, and *Kaufman v. Tacoma etc. R. Co.*, 11 Wash. 632, 40 Pac. 137, the instruction of the trial court was not erroneous, if a county in this state is a municipal corporation, in contemplation of said § 16, art. 1, of the constitution. Ap-

pellant contends, however, that a county is not such a municipal corporation. We do not think this contention can be sustained. We construe the words "any corporation other than municipal," in said section, as referring to private corporations only, and, as distinguished therefrom, excluding all public or political corporations. That the words "municipal corporations," in this state, frequently include counties clearly appears from other sections of the constitution. In § 2, art. 7, we find the words, "state, *counties*, school districts, and other municipal corporations;" in § 6, art. 8, the words, "No *county*, city, town, school district, or other municipal corporation;" in § 7, art. 8, the words, "No *county*, city, town, or other municipal corporation;" in § 12, art. 11, the words, "*counties*, cities, towns, or other municipal corporations;" and in § 15, art. 11, the words, "any *county*, city, town, or other public or municipal corporation." This court, in *Board of Directors v. Peterson*, 4 Wash. 147, 29 Pac. 995, in commenting on the words, "no county, city, town, school district, or other municipal corporation," found in § 6, art. 8, of the constitution, at page 151, said:

"We are forced to the conclusion that every public corporation formed by the state for the purpose of carrying out any of the duties which the state owes to any locality, and which by its terms are made alike applicable to all the inhabitants of the district or locality affected thereby, must be held to be included within the 'other municipal corporations,' named in said section."

That counties in this state are public corporations clearly appears from Bal. Code, § 265, reading as follows: "The several counties of this state shall have capacity as bodies corporate to sue and be sued in the manner prescribed by law," etc. In *Maxon v. School District No. 34*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110, this court held that, for certain purposes, school districts are municipal corpora-

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tions, within the contemplation of the legislative and constitutional enactments of this state. For the purpose of general designation, it is not uncommon to use the term "municipal corporations" in a sense including *quasi* corporations to distinguish public or political corporations from those which are termed private. 7 Am. & Eng. Enc. Law, 902; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Mount Pleasant v. Beckwith*, 100 U. S. 524, 25 L. Ed. 699.

It is our construction that the words, "any corporation other than municipal," as used in § 16, art. 1, of the constitution, are intended to exclude public or political corporations, as distinguished from private corporations. We are therefore of the opinion that a county, in the state of Washington, should be considered a municipal corporation, under said section, and, for this reason, hold that the court did not err in the instruction given.

The appellant also claims that the court erred in rendering a decree for the plaintiff, and refusing to grant appellant a new trial. In support of this contention, appellant urges that the jury found a verdict for the sum of \$202.25, the exact amount allowed by the county commissioners, and that the amount allowed was scarcely sufficient to pay for the land taken at its actual value, as shown by the evidence. We have examined the evidence, and are fully satisfied that it is sufficient to sustain the verdict of the jury. We do not think any inference can be drawn from the fact that the verdict was for \$202.25, as the court instructed the jury that, by reason of said sum having been tendered by the county, no less amount could be allowed; and we are not at liberty to assume that the jury might not have awarded even a less sum, had it not been for such instruction.

We find no error in the record, and the judgment is therefore affirmed.

MOUNT, C. J., DUNBAR, RUDKIN, and ROOT, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 5466. Decided February 6, 1905.]

LUMBERMEN'S NATIONAL BANK, *Appellant*, v. DAVID GROSS, *Garnishee, Respondent*.¹

HUSBAND AND WIFE—CONTRACTS—JOINT NOTE—CONSIDERATION—LIABILITY OF WIFE'S SEPARATE ESTATE. The obligation of a husband as a member of a firm, to pay his pro rata share of the firm indebtedness, being a community debt, is a sufficient consideration for the joint note of the husband and wife, and for the transfer of the separate property of the wife to the husband's partner, who had paid the firm debt out of his individual estate.

SAME—ASSIGNMENT OF WIFE'S SEPARATE ESTATE TO PAY JOINT DEBT—FRAUDULENT CONVEYANCES. The joint note of a husband and wife binds the wife's separate property, and an assignment of her separate property in payment of the same is not fraudulent as to creditors as being without consideration.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered July 29, 1904, upon findings in favor of a garnishee, after a trial on the merits before the court without a jury, discharging a writ of garnishment. Affirmed.

Fogg & Fogg, for appellant, contended, *inter alia*, that a past consideration, if it imposed no legal obligation at the time it was furnished, will not support a promise. 9 Cyc. 358; *Thomson v. Thomson*, 78 N. Y. Supp. 389; Clark, Contracts, p. 197; Parsons, Contracts, ch. 16; *Mills v. Wyman*, 3 Pick. 207; *Dearborn v. Bowman*, 3 Met. 155; *Roscorla v. Thomas*, 3 Q. B. 234, 43 E. C. L. 713; *Znaturjian v. Boornazian* (R. I.), 55 Atl. 199; *Leverone v. Hildreth*,

¹Reported in 79 Pac. 470.

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80 Cal. 139, 22 Pac. 72; *Cock v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Leslie v. Glass*, Fed. Cas. 8275; *Schnell v. Nell*, 17 Ind. 29; *Allen v. Bryson*, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358. The promise to perform an existing contract with a third person is not a valuable consideration. 9 Cyc. 353; *Wadhams v. Page*, 1 Wash. 420, 25 Pac. 462; *Early v. Burt*, 68 Iowa 716, 28 N. W. 35; *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Merrick v. Giddings*, 1 Mackey (D. C.), 394; *Nine v. Starr*, 8 Ore. 49. Neither the payment of the debts by David Gross, nor any promise by him to pay them, would be a sufficient consideration for the promises by Johanna Gross to reimburse him. *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. 301; *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195; *Davenport v. First Cong. Soc.*, 33 Wis. 387; *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873; *Johnson's Adm'r v. Seller's Adm'r*, 33 Ala. 265; *Holloway's Assignee v. Rudy*, 22 Ky. Law 1406, 60 S. W. 650; *Lewis v. McReavy*, 7 Wash. 294, 34 Pac. 833; *Tolmie v. Dean*, 1 W. T. 46; *Stickler v. Giles*, 9 Wash. 147, 37 Pac. 293; *Alaska Packers' Ass'n. v. Domenico*, 117 Fed. 99. The transfer of the \$4,725 note to David Gross was void as to Johanna's creditors. *Knower v. Haines*, 31 Fed. 513; *Jose v. Hewett*, 50 Me. 248; *First Nat. Bank v. Bertschy*, 52 Wis. 438, 9 N. W. 534; *Neal v. Foster*, 36 Fed. 29; *Schoonover v. Foley* (Iowa), 94 N. W. 492. Its necessary effect was to hinder and delay her creditors. 1 Freeman, Executions, pp. 655, 657; *Klosterman v. Harrington*, 11 Wash. 138, 39 Pac. 376; *Carkeek v. Boston Nat. Bank*, 16 Wash. 399, 47 Pac. 884; *Allen, etc. Com. Co. v. Grumbles*, 129 Fed. 289; *Egery v. Johnson*, 70 Maine 258; *Dowell v. Applegate*, 15 Fed. 419; *Spear v.*

Spear, 97 Maine 498, 54 Atl. 1106; *Benson v. Benson*, 70 Md. 253, 16 Atl. 657.

F. Campbell, for respondent.

RUDKIN, J.—The plaintiff brought this action against Johanna Gross and others to recover judgment on a promissory note. In such action a writ of garnishment was issued, and served on the garnishee respondent, David Gross, and the liability of the garnishee is the only question before the court on this appeal. Judgment was rendered in the court below discharging the writ.

The facts on which it is sought to hold the garnishee liable are these: In 1893 the firm of Gross Brothers, a partnership composed of the respondent, David Gross, Ellis H. Gross, husband of the defendant Johanna Gross, and Morris Gross and Abraham Gross, was indebted to the London & San Francisco Bank. For the purpose of securing this indebtedness, and further advances to be made to the firm by the bank, the respondent, David Gross, and Morris Gross, two members of said firm, mortgaged their individual property in the city of Tacoma to the bank. In 1896 this mortgage was foreclosed, and the individual property of the respondent and the said Morris Gross, covered by said mortgage, was sold on execution, and bid in by the bank, and by it accepted at a valuation of \$18,000, which was applied on the firm indebtedness to the bank. On the 23d day of September, 1898, the defendant Johanna Gross and her husband, Ellis H. Gross, entered into a written agreement reciting, among other things, the payment of \$18,000 of the firm indebtedness by the respondent and the said Morris Gross out of their individual property; the death of Abraham Gross, one of the members of said firm; that the defendant Johanna Gross and Ellis H. Gross, her husband, were liable for, and should pay one-third of, said

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sum of \$18,000, or \$6,000; and that \$4,500 of said sum of \$6,000 was due to respondent, David Gross, and \$1,500 thereof to the said Morris Gross. This agreement closed as follows:

"Now, therefore, in consideration of the premises, we, Ellis H. Gross and Johanna Gross, do hereby acknowledge ourselves jointly and severally indebted to David Gross, in the sum of \$4,500, and to Morris Gross in the sum of \$4,500, and agree to pay them the said sums respectively on demand, after date hereof, without interest;"

and was signed by the said Ellis H. Gross and Johanna Gross. This agreement is taken from the findings of the court. The agreement to pay Morris Gross the sum of \$4,500 is probably an error, and was intended for \$1,500, but such error is not material for the purpose of this appeal.

Again, some time prior to the 16th day of October, 1893, the firm of Gross Brothers became indebted to Brigham-Hopkins Company, for merchandise sold to the firm. Suit was brought on this account, after the death of Abraham Gross, against the three surviving members of the firm. This suit was settled and compromised by the respondent, and in payment and satisfaction of the portion of the amount so paid, which should have been paid by the said Ellis H. Gross, the said Ellis H. Gross and Johanna Gross, on the 10th day of November, 1903, executed to the respondent their certain joint and several promissory note, for the sum of \$600, payable on demand. On the 10th day of June 1903, The Ellis H. Gross Company was indebted to Johanna Gross in the sum of \$4,725, and on that day executed and delivered to Johanna Gross its certain promissory note for said amount, payable on demand. This note was the separate property of Johanna Gross. On the 10th day of January, 1904, Johanna Gross assigned and transferred said last mentioned promissory note to the respondent, David Gross, in payment of the amount due on

the \$600 note hereinbefore described, the balance to be applied on the agreement to pay to the respondent the sum of \$4,500 hereinbefore described.

The garnishment in question was not issued until February 27, 1904. Prior to the service of the writ of garnishment, The Ellis H. Gross Company was adjudged insolvent, and a receiver appointed, and on the 3d day of March, 1904, the receiver of The Ellis H. Gross Company paid to the respondent the sum of \$2,274.70, on account of the said promissory note, so assigned and transferred by Johanna Gross to the respondent. The Ellis H. Gross Company is insolvent, and no further sum will be paid for or on account of said note. At the time said note was so assigned by the said Johanna Gross to the respondent, Johanna Gross was insolvent, and had no other property subject to execution. Johanna Gross was never a member of the firm of Gross Brothers, and her separate property was in no manner liable for the firm debts.

Upon these facts the appellant contends that the \$600 note, and the agreement to pay the sum of \$4,500, mentioned in the foregoing statement of the case, were without consideration, so far as concerns the defendant, Johanna Gross, and that there was, therefore, no consideration for the assignment and transfer of her note of \$4,725 to the respondent, David Gross, in payment and satisfaction of said note and agreement, and that the transfer so made was void as against the appellant.

It will be conceded that the separate property of Johanna Gross was not liable for the payment of any part of the firm indebtedness of Gross Brothers, and that no personal judgment could be recovered against her for any part of such indebtedness. This concession is made, of course, in the absence of any agreement on her part rendering herself, or her separate property, liable. We presume it will also be conceded that Ellis H. Gross was bound to repay to

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the respondent, David Gross, his pro rata share of the firm indebtedness which the respondent was compelled to pay out of his individual property, and that such obligation was a community obligation of the said Ellis H. Gross and his wife, Johanna Gross. That this pre-existing debt or obligation was a sufficient consideration for the agreement and note, in so far as Ellis H. Gross was concerned, cannot be questioned. 1 Daniel, Neg. Inst. (5th ed.), § 184.

We are also satisfied that it was a sufficient consideration for the agreement and note of the community consisting of husband and wife. A community debt or obligation, past or present, is a sufficient consideration for a joint note of the husband and wife. Upon such a note a personal judgment can be recovered against both husband and wife, and on such judgment the community property of the husband and wife, and the separate property of either, not otherwise by law exempt, can be taken in execution. It seems to us that any other rule would lead to the utmost uncertainty and confusion. Under the law of this state, a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose. Her signature to a contract imports the same obligation as the signature of any other person, viz.: that a judgment may be taken against her for failure to perform, and that her separate property may be taken in execution to satisfy the judgment. We are satisfied, therefore, that the note and agreement referred to were founded upon a sufficient consideration, as to both Ellis H. Gross and the defendant Johanna Gross, and that the transfer of the note of Johanna Gross, though her separate property, in satisfaction of such note and agreement, was not without consideration, and was not fraudulent or void as against the appellant bank.

The judgment of the court below was in accordance with these views, and the same is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 5498. Decided February 6, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. WASHINGTON
PATCHEN, *Appellant*.¹

APPEAL AND ERROR—EVIDENCE—SUFFICIENCY OF OBJECTIONS—WAIVER OF ERROR. Where an objection is improperly sustained and exceptions taken, but the same question is repeated in a different form, and answered, whereupon the court sustains the objection and cautions against further inquiry along that line, but the answer is allowed to stand and the defendant had the benefit thereof, there is no ruling of the trial court that can be reviewed on appeal (FULLERTON, J., dissenting).

CRIMINAL LAW—RAPE—EVIDENCE. In a prosecution for rape upon a child, committed in the presence of other children called as witnesses for the state, it is not proper to restrict their cross-examination by the defendant, and that it tends to show the commission of another crime by defendant is no valid objection.

CRIMINAL LAW—RAPE—UNSUPPORTED TESTIMONY OF CHILD. It is proper to instruct that one may be convicted of rape upon the unsupported evidence of an infant under the years of discretion.

TRIAL—ARGUMENT OF COUNSEL—LIMITING. Error cannot be predicated in a criminal prosecution upon limiting the argument of counsel to twenty-five minutes, where counsel refused to use ten minutes additional, granted at the close of his argument.

CRIMINAL LAW—EXCESSIVE SENTENCE—REVIEW. The severity of a sentence is not the subject of review upon appeal.

Appeal from a judgment of the superior court for King county, Bell, J., entered September 5, 1903, upon a trial and conviction of the crime of rape. Affirmed.

¹Reported in 79 Pac. 479.

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Opinion Per RUDKIN, J.

T. D. Page, for appellant.

W. T. Scott and Hermon W. Craven, for respondent.

RUDKIN, J.—The defendant in this cause was convicted of the crime of rape upon a female child of the age of ten years. From the judgment and sentence of the court this appeal is prosecuted. It will be unnecessary to refer to the testimony, except for the purpose of explaining the ruling of the court in excluding evidence on cross-examination, to which an exception was taken.

(1) The offense was committed in a room occupied by the appellant. There were present at the time, the appellant, the prosecuting witness, and two other children of the ages of eleven and twelve years, respectively. The three children went to the room together, and remained there but a very short time, during which the crime is alleged to have been committed. One of the children, other than the prosecuting witness, was a witness for the state at the trial. Counsel for appellant asked her on cross-examination, in substance, if the appellant committed the same crime upon her, at the same place, and immediately after the commission of the crime against the prosecuting witness, for which the appellant was on trial. The court sustained an objection to this question, and an exception was allowed. Counsel for appellant immediately repeated the question in a slightly different form, and the witness answered: "Yes, sir." After the question was answered, the court, of its own motion, sustained the objection, and cautioned counsel not to proceed further along that line. The answer of the witness was permitted to stand; the appellant had the full benefit of the answer; and it was no doubt the answer he expected, as his counsel adverts to this answer in his argument to this court. There was, therefore, no ruling of the trial court which can be reviewed in this court. We do not desire to be understood, however, as

approving the ruling of the trial judge in thus restricting the cross-examination of these three witnesses. Under the circumstances of this case, we think the appellant should have been permitted to interrogate all these witnesses fully, as to everything that transpired in the room during the brief time they were there, for the purpose of testing their credibility, and for the further purpose of showing the improbability of the truth of their testimony, if he could. The fact that such cross-examination tended to prove the commission of another crime was no valid objection.

(2) Counsel excepted to the following instruction given by the court:

"One may be convicted of the crime of rape upon the unsupported evidence of an infant under years of discretion, if the jury is satisfied that the evidence is such as to leave no reasonable doubt of guilt."

Counsel has failed to point out any error in this instruction, and the court discovers none.

(3) Error is assigned because the court unduly limited counsel in his argument to the jury. The record shows that, at the close of the testimony, the court gave counsel fifteen minutes on each side in which to complete their arguments to the jury. Counsel for appellant objected to this limitation, and the court thereupon allowed counsel for appellant twenty-five minutes, and counsel for the state twenty minutes. After counsel for appellant had consumed the twenty-five minutes allowed by the court, the court informed him that he would be allowed ten minutes additional. Counsel refused to proceed further, unless the court would permit him to occupy this additional time after the close of the closing argument for the state. Under these facts, we do not think that the appellant can complain of the limitation fixed by the court, for the reason that he did not occupy all the time accorded to him.

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Syllabus.

Complaint is made of the severity of the sentence. The sentence seems unduly severe, in view of the advanced age of the appellant and the character of the prosecuting witness and her associates, as disclosed at the trial. But this question is not subject to review in this court.

Finding no reversible error in the record, the judgment is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

ROOT and CROW, JJ., took no part.

FULLERTON, J. (dissenting)—I cannot concur in the conclusion of the majority on the first proposition discussed. It is conceded that the trial court committed error in ruling as it did, and, as the appellant excepted to that ruling, appealed from the judgment pronounced against him, and assigned the ruling as error, I can see no reason why he should not have the error reviewed in this court. The judgment should be reversed, and a new trial ordered.

[No. 4845. Decided February 7, 1905.]

PATRICK J. CAREY, *Respondent*, v. GUSTAVE HERTEL
et al., *Appellants*.¹

PARENT AND CHILD—CUSTODY OF INFANT—AGREEMENT TO KEEP FOR SPECIFIED TIME—DISCRETION OF TRIAL COURT. A father, who is a suitable and capable person, is entitled to the custody of his daughter three years of age, notwithstanding an agreement to leave her with grandparents until she was six years of age, where it appears that he was to pay the grandparents for their services, and that the findings of the court as to his suitability are sustained by the evidence; since the welfare of the child is the paramount consideration, and the trial judge, who observes the witnesses, must exercise his discretion in that behalf.

¹Reported in 79 Pac. 482.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered May 7, 1903, upon findings in favor of the plaintiff, after a hearing on the merits, in a habeas corpus proceeding. Affirmed.

Meyers & Warren, for appellants, cited: *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa 199, 16 N. W. 91; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *State v. Smith*, 6 Greenl. (Me.) 462, 20 Am. Dec. 324; *In re Mc'Dowle*, 8 Johns. 328, *State v. Barrett*, 45 N. H. 15; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *In re Goodenough*, 19 Wis. 291; *State ex rel. Anderson v. Anderson*, 89 Minn. 198, 94 N. W. 681; *State ex rel. Flint v. Flint*, 63 Minn. 187, 65 N. W. 272; *Arne v. Holland*, 85 Minn. 401, 89 N. W. 3.

John E. Ryan (*H. N. Martin* and *James T. Lawler*, of counsel), for respondent, cited: *Johnson v. Terry*, 34 Conn. 259; *Henson v. Walts*, 40 Ind. 170; *State v. Richardson*, 40 N. H. 272; *People v. Humphreys*, 24 Barb. 521; *McGlennan v. Margowski*, 90 Ind. 150; *Commonwealth v. Snyder*, 11 Lane. Bar. (Pa.) 62; *In the matter of Kottman*, 2 Hill 363, 27 Am. Dec. 390; *Rust v. Vancaster*, 9 W. Va. 600.

HADLEY, J.—This is a habeas corpus proceeding, instituted by respondent to procure the possession of his child, a little girl three years of age. The mother of the child died when the latter was about three months old. Respondent then left her with appellants, the parents of the child's mother, under an agreement to pay them for her care. She remained continuously with her grandparents until the bringing of this action. Appellants claim that respondent left the child with them under an agreement that they could keep her until she was six years of age.

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Opinion Per HADLEY, J.

After a hearing, the court entered judgment that the father is entitled to the custody of the little girl, and ordered that she should be delivered into his possession. This appeal is from the judgment.

The court found that respondent "is a sober, industrious, and moral man, capable of taking charge and control of his daughter, and that he desires to have the control and bringing up of his daughter, and is fully able to care for her in every way." The finding is fully supported by the evidence. The grandparents resist the father's claim for possession because of a verbal agreement that they could keep the child until she was six years old. The facts were similar in the case of *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 Pac. 660, 43 Am. St. 839. The mother of the child had agreed with the respondent, in that case, that the child should remain in the institution until she was eighteen years of age; but this court held that the parent was, nevertheless, entitled to the custody of her daughter and the comfort of her society.

It is argued by appellants here that the House of the Good Shepherd was a corporation, and that no element of affection existed, as in this case. The lack of the element of affection was commented upon in that case, and it was stated that some cases hold that the parent cannot assert his right to the child after he has given it into the care of another, such holdings being founded upon the humane idea that, by reason of the long and intimate intercourse between the child and the foster parent, and of mutual affection arising therefrom, it would be heartless to force a separation. In the case at bar, the child was but three years of age when the father sought her possession by this proceeding. Her age is such that the deeply grounded affection which arises from long time association, extending into more mature years, is necessarily wanting.

Her father's affection for her prompts him to desire her care and custody. He is not only primarily entitled to her care, but he is a suitable person to be charged therewith, is amply able to provide well for her comfort and education, and is entitled to the comfort of her society, and to her increased affection for him, which in ordinary experience must follow. The future welfare of the child is the paramount consideration, and, with that fact in view, under such circumstances as appear in this case, the trial court, who sees and observes the contending parties, must be permitted to exercise some discretion in an endeavor to serve the best interests of the child.

Under the evidence in this case, we think, there was no abuse of discretion in ordering the child delivered to the father. The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4826. Decided February 9, 1905.]

THE STATE OF WASHINGTON ON THE RELATION OF OUDIN
& BERGMAN FIRE CLAY MINING & MANUFACTURING
COMPANY, *Plaintiff*, v. THE SUPERIOR COURT
FOR SPOKANE COUNTY *et al.*, *Defendants*.¹

MANDAMUS—CESSATION OF CONTROVERSY. A writ of mandate to compel the superior court to proceed with the trial of a case, pending an appeal from an interlocutory order, will not be granted where, before the hearing thereon, the appeal was determined, and the trial court only refused to proceed pending said appeal, since the controversy has ceased to exist.

Application for a writ of mandate, filed in the supreme court November 11, 1903, to compel the superior court for

¹Reported in 79 Pac. 483.

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Opinion Per Curiam.

Spokane county, Kennan, J., to set a cause for trial. Dismissed.

Thayer & Belt, for relator.

PER CURIAM.—This is an original application in this court for a writ of mandate, directed to the superior court of Spokane county, and to the Hon. Henry L. Kennan, one of the judges thereof. The affidavit in support of the application recites, that in April, 1903, the relator began an action in the said court, against Thomas F. Conlan and Martin L. Bergman, for the purpose of enjoining them from interfering with the property or business of the relator, and that said court granted a temporary injunction; that, from the order granting the same, an appeal was taken to this court, and that, at the time this application was made, said appeal was pending for hearing; that, after the issuance of the temporary injunction, the issues in the main case were joined, and that the cause was ready for trial; that relator had applied to the said court and said judge to assign the cause for a hearing, and to proceed with the trial, which application was refused, upon the ground that some of the questions which would arise upon the trial of the cause would probably be determined on the above mentioned appeal.

The purpose of this application was to procure a writ of mandate, directing the superior court to proceed with the trial of the main case, notwithstanding the appeal from the temporary injunction. Said appeal has, however, been determined. See *Oudin & Bergman etc. Co. v. Conlan*, 34 Wash. 216, 75 Pac. 798. Since it appears that the only ground of refusal to proceed with the trial was that the court should delay until it could have the benefit of questions that should be decided on the appeal, the controversy has therefore ceased to exist, and the application is dismissed.

[No. 4755. Decided February 9, 1905.]

BENJAMIN BANK, *Respondent*, v. EARLE DOHERTY *et al.*,
Appellants.¹

EXECUTIONS—SALE—VACATION—PARTIES ENTITLED TO NOTICE. The purchaser at an execution sale is not a party in interest upon whom notice of motion to vacate the sale must be served, where he had previously parted with his interest to the execution creditor, who appeared and contested the motion.

SAME—VACATION FOR INADEQUACY OF PRICE—SEIZURE OF NOTE FILED AS RECORD IN CASE. The sale under execution of a note and mortgage of the value of \$2,400, for \$110.20 (the costs upon an appeal), is properly vacated, where it appears, in addition to such inadequacy of price, that possession was obtained by seizing the same after they had been filed in the clerk's office as part of the record in said cause, without notice of the seizure to the owners, who shortly after the sale moved its vacation immediately upon learning thereof.

Appeal from an order of the superior court for King county, Tallman, J., entered April 10, 1903, vacating an execution sale, after a hearing upon affidavits. Affirmed.

Roberts & Leehey, for appellants.

Preston, Carr & Gilman, for respondent.

PER CURIAM.—This is an appeal from an order vacating and setting aside a sale. In the early part of the year 1901, the respondent began an action against the appellants, in the superior court of King county, to foreclose a mortgage upon real property. In due course he recovered a judgment and decree of foreclosure in that court, and the judgment was brought here by the appellants for review. This court reversed the judgment (29 Wash. 233, 69 Pac. 732, 92 Am. St. 903), and sent the cause back with instructions to dismiss the action, holding that the same had been

¹Reported in 79 Pac. 486.

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Opinion Per Curiam.

prematurely brought. When the remittitur went down, judgment was entered in the court below, in favor of the appellants and against the respondent, for the sum of \$101.45, being the costs in both courts. Execution was thereafter issued on the judgment, and placed in the hands of the sheriff, who seized and sold the respondent's note and mortgage, which had been filed in the clerk's office as a part of the records in the foreclosure suit.

Shortly after the sale took place, the respondent learned of the same, and immediately took steps to have the sale vacated and set aside, filing a motion for that purpose in the court out of which the execution issued. Affidavits were filed in support of and against the motion, and a hearing had, which resulted in an order vacating and setting aside the sale. The motion was based on several grounds, including inadequacy of price, irregularity in the proceedings, failure to give proper notices of the sale, or to notify the judgment debtor thereof. The order of vacation was general, setting out no particular reason.

The appellant first assigns that the court erred in entertaining the motion to vacate the sale, because the same was not served on the purchaser at the sale; but we think this objection is met by the fact that the purchaser had parted with his interest in the note and mortgage prior to the hearing on the motion, having surrendered them to the administrator, and cancelled the mortgage of record. At the time the order of vacation was entered, the only person interested in upholding the sale was the administrator, and there is no question that he had been served with notice of the proceedings—in fact, he appeared and engaged actively in defending it.

On the main question, we are not inclined to disturb the holding of the trial court. The note sold had an actual value in excess of \$2,400, and was sold for only \$110.20.

This alone appeals strongly to the conscience of the court, and although it perhaps is the rule that inadequacy of price alone is not usually a sufficient ground to set aside the sale, we think that in this case, in view of the manner in which possession of the note was obtained, and the whole surroundings, it should be allowed to prevail. This view of the case renders other questions discussed immaterial. The order appealed from will stand affirmed.

The judgment is affirmed.

[No. 4794. Decided February 9, 1905.]

EMMA WHITE, *Respondent*, v. IRA M. KRUTZ *et al.*,
Appellants.¹

LIMITATIONS OF ACTIONS—MORTGAGES—BILLS AND NOTES—EXTENSION OF TIME—FAILURE TO PAY INSTALLMENTS. A provision, in an agreement to extend the time of payment of a mortgage note, to the effect that the note shall become due without notice upon the failure to pay any installment of interest, does not mature the note or start the running of the statute of limitations upon the failure to pay an installment when due; since the provision is for the benefit of the mortgagee, and may be waived.

SAME—EXTENSION OF TIME—RECORDING—NOTICE TO SUBSEQUENT PURCHASER. An extension of the time of the maturity of a mortgage note, made while the mortgagee still owns the property, need not be recorded, and is valid as against the mortgagor and subsequent purchasers without notice, so that the statute of limitations does not begin to run against an action of foreclosure until the expiration of such extension.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered March 4, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, decreeing the foreclosure of a mortgage. Affirmed.

¹Reported in 79 Pac. 495.

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Opinion Per FULLERTON, J.

W. H. Bogle and Charles Richardson, for appellants.

John J. Rudkin, for respondent.

FULLERTON, J.—On December 3, 1891, the defendant, Mary J. McMillan, executed and delivered to the Solicitors Loan & Trust Company her promissory note for \$700, securing the same by mortgage on certain lots in the city of North Yakima. The debt matured, by the terms of the contract, on January 1, 1895. On the day last named the Solicitors Loan & Trust Company, being then the owner and holder of the note and mortgage, entered into a written agreement with the mortgagor and the defendants, John Stone and Emma Stone, who had acquired an interest in the mortgaged property, to the effect that the time of payment of the mortgage should be extended for three years, in consideration that John Stone and Emma Stone should assume and agree to pay the mortgage debt, and that interest should be paid thereon semi-annually; the agreement further providing that, if default should be made in any of such payments, the indebtedness represented by the original note and mortgage should immediately become due and payable, without notice. This extension agreement was never recorded, and no payments were made on the loan subsequent to its execution.

On the 11th day of December, 1901, the defendant, George Donald, and the appellants, Krutz and wife, purchased the mortgaged premises from the defendants McMillan and Stone, paying therefor \$100. At that time they had no knowledge of the extension agreement. The note was sold and assigned by the Solicitors Loan & Trust Company, after the extension agreement was entered into, to the respondent, who began this action to recover upon the note, and foreclose the mortgage given to secure the same. To the complaint in foreclosure, the appellants

pleaded the statute of limitations, and, on judgment going against them, prosecuted this appeal.

In support of their appeal the appellants make two principal contentions: (1) that the statute of limitations commenced to run immediately upon the first default in payment of interest, occurring after the execution of the extension agreement, which was more than six years prior to the commencement of the action to foreclose the mortgage; and (2) that the extension agreement was of no effect, as against the appellants, for the reason that it was not recorded, and the appellants, at the time of their purchase, had no actual notice thereof.

The principle involved in the first contention was decided adversely to the appellants' claim in the case of *First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. 828. We there held that a provision in a mortgage to the effect that the same should become due upon the failure to pay the installments of interest, as they matured, was a provision for the benefit of the mortgagee that could be waived by him, and one that could not be taken advantage of by the mortgagor. Applying that principle here, it is clear that, if the extension agreement is binding at all, it extended the time of payment until January 1, 1898, in so far as the right of the mortgagors, or their privies, to plead the statute of limitations is concerned.

The second contention is thought to be supported by the cases of *George v. Butler*, 26 Wash 456, 67 Pac. 263, 90 Am. St. 756, 57 L. R. A. 396; *Denny v. Palmer*, 26 Wash. 469, 67 Pac. 268, 90 Am. St. 766; *Raymond v. Bales*, 26 Wash 493, 67 Pac. 269; and *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271. But it will be observed that in these cases the mortgagor attempted to extend the lien of the mortgage after he had parted with his interests in the mort-

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Opinion Per FULLERTON, J.

gaged property, and this it is held he could not do. This is made clear by the remark of the court in *Raymond v. Bales* (page 497), where it is said:

"The theory upon which the last-named case, and also that of *George v. Butler*, *supra*, were decided, was that, the mortgagor having lost his control of the lands by his conveyance to a grantee of the equity of redemption, and the grantee's rights having attached, no act of the mortgagor can affect the rights of the grantee;"

And, also, in *Hanna v. Kasson*, where it is said that this court had, in the cases that had preceded that one, approved the rule adopted by the supreme court of California,

" . . . to the effect that after the rights of a grantee have attached, no act of the mortgagor will have the effect to arrest the running of the statute as against the grantee without the grantee's consent and authority."

The court did not, however, deny, or intend to deny, the converse of the proposition, namely, that a mortgagor who still retained his ownership in the mortgaged property could make a valid contract of extension of the original mortgage, which would be binding upon his subsequent grantee, whether the grantee takes with or without notice of such extension. The case before us presents the latter proposition, not the former, and we hold there was no bar to the right of the respondent to foreclose her mortgage.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5312. Decided February 9, 1905.]

E. L. TANNER, *Appellant*, v. TOWN OF AUBURN *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS—CONTRACTS—LIGHTING STREETS—NECESSITY OF ADVERTISING FOR BIDS. A contract to furnish a town with electricity for street lighting purposes is not a contract for the erection or improvement of a public work, nor for "street work" within Laws 1903, p. 33, requiring such contracts to be submitted to competitive bidding.

SAME—CONTRACTS—EXTENDING BEYOND EXPIRATION OF TERM OF OFFICE. The mayor and council of a town may contract for lighting the streets for a period of time extending beyond the expiration of their terms of office.

Appeal from a judgment of the superior court for King county, Bell J., entered April 13, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to enjoin the execution of a municipal contract. Affirmed.

Tucker & Hyland, for appellant.

Piles, Donworth & Howe, Elmer E. Todd and I. B. Knickerbocker, for respondents.

RUDKIN, J.—On the 5th day of May, 1903, the town of Auburn, through its mayor and town council, entered into a contract with the Puget Sound Electric Railway, under which the Puget Sound Electric Railway agreed to furnish said town with electric lights, for lighting the streets and public places of the town, for a term of three years from October 1, 1903. This action was commenced by the plaintiff, as a taxpayer of the town, to restrain the Puget Sound Electric Railway, the town, and its officers, from carrying out the terms of the contract. The court below

¹Reported in 79 Pac. 494.

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Opinion Per RUDKIN, J.

dismissed the action, and from its judgment an appeal is taken.

The appellant claims that the contract above set forth is void for two reasons: (1) because the contract was not let to the lowest bidder after notice, as required by the act of March 4, 1903, Laws 1903, p. 33; and (2) because the contract extended beyond the term of office of the officers letting and executing the same.

(1) The above act, so far as material to the question now under consideration, is as follows:

“In the erection, improvement and repair of all public buildings and works, in all street and sewer work, and in all work in or about streams, bays or water fronts or in or about embankments, or other works for protection against overflow and in furnishing any supplies or materials for the same, when the expenditure required for the same exceeds the sum of five hundred dollars, the same shall be done by contract and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance.”

The appellant relies on the decision of this court in the case of *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836. In that case,

“The regents of the Agricultural College, Experiment Station and School of Sciences of the state of Washington entered into a contract with the city of Pullman, through its mayor, that the college or the state would construct a reservoir on a point of land in the rear of the college, of 250,000 gallons capacity, lay a six-inch main therefrom to connect with the town pump of the city of Pullman, give to the town the use of said reservoir and pipe, and also give to the town the right to buy the said main at actual cost of laying the same, a certain monthly stipend for pumping the water for the use of the college, and a certain number of cents per gallon for water used for irrigation. At the end of the term for which the contract ran, the city refused to buy the plant, and this action was brought by the state

to recover the value thereof, which was alleged to be \$2,-171.36."

It can readily be seen that the contract in that case was, in substance and effect, a contract for a public work, and came directly within the prohibition of the statute in force at that time. We do not think, however, that a contract for lighting the streets and public places of the town can, in any just sense of the term, be designated as a contract for the erection, improvement, or repair of a public building or work, or as street or sewer work, as defined by the act in question. This precise question was before the supreme court of California in the case of *Electric Light & Power Co. v. San Bernardino*, 100 Cal. 348, 34 Pac. 819. The court in that case says:

"Does the lighting of streets, as here described, come within the term 'street work,' as used in the foregoing provision of the statute? We are satisfied that it does not, and to give such a meaning would demand a construction of the statute entirely unjustifiable by its language. 'Street work' is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street—work in repairing or making a street. The phrase is found in the decisions of this court, and in the statutes of the state, times without number, and its construction as indicated, to our knowledge, has never been questioned. The parties plaintiff and defendant entered into an express contract. The plaintiff furnished the light at the time and upon the terms demanded by the contract, and the city now refuses to pay the balance due under its contract, upon the ground that notice was not given in the newspapers and bids requested. Such being the status of the case, it certainly is not demanded of us that doubtful constructions, even if this provision gave occasion for them, should be resolved in favor of the defendant. The provision, fairly construed by all rules of construction, does not bring the subject of this litigation within the term 'street work,' as used in the statute.

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"There can be no question as to the sound policy of a law requiring municipal corporations to enter into contracts for the payment of money only after full notice and opportunity for competition; but that is not a matter for our consideration here. We must take the statute as we find it. We can neither add to it nor subtract from it. It is our duty alone to construe it as it stands enacted."

For these reasons we think that the first objection to the validity of the contract is not well taken.

(2) The power of a town council to enter into a contract for light, for a period of three years and beyond the term of office of the officers executing the contract, cannot be questioned at this day, in the absence of some constitutional or statutory prohibition. In *Townsend Gas etc. Co. v. Port Townsend*, 19 Wash. 407, 53 Pac. 551, a five-year lighting contract was upheld by this court, under a similar charter provision, but the question here presented does not appear to have been raised or passed upon. See, also, *Atlantic City Water Works v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24; *Vincennes v. Citizens' Light & Coke Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. The fact that the contract extended beyond the term of the officers executing the same is not material. *Taylor v. School District*, 16 Wash. 365, 47 Pac. 758; *Splaine v. School District*, 20 Wash. 74, 54 Pac. 766.

The contract in question is not void for any of the reasons stated, and the judgment of the court below is therefore affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ., concur.

Root and Crow, JJ., took no part.

[No. 4864. Decided February 9, 1905.]

WILLIAM H. CUMMINGS *et al.*, Respondents, v. ROBERT
WEIR *et al.*, Appellants.¹

APPEAL AND ERROR—REVIEW—EVIDENCE. It is harmless error to receive secondary evidence as to records, where the records were afterwards introduced in evidence.

CONTRACTS—EVIDENCE OF ENTIRE CONVERSATION—RELEVANCY. Upon an issue as to the execution of a verbal contract to pay for certain information relative to timber and homestead locations, where the defendants on the same day sought to obtain a reduction of the price, the plaintiff is entitled to detail all the conversation that then took place, as tending to show whether the contract had been made, and it is not error to refuse to strike evidence of a remark then made by plaintiff impugning defendants' honesty.

TRIAL—COMMENT ON FACTS—APPEAL—REVIEW—CURING ERROR BY INSTRUCTIONS. Where the plaintiffs had pleaded on a *quantum meruit* and the proof showed an express contract, it is not reversible error that the court, during the progress of the trial in interrogating counsel concerning the relation of the pleadings to the evidence, unlawfully commented on the facts by stating that the proof clearly showed an express contract, where the error was subsequently cured by full instructions as to the province of the jury alone to determine the existence of the contract.

PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. It is not error to allow a trial amendment to conform to the proof by changing a demand on *quantum meruit* to one for a specific sum, where there was no attempt to show prejudice thereby nor a request for a continuance.

CONTRACTS—FURNISHING INFORMATION TO LOCATE CLAIMS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a verdict finding liability upon a contract to pay for information whereby the defendants secured timber and homestead locations, where it appears that they secured their first information from the plaintiffs, made locations in pursuance thereof, and agreed to pay a specified sum per claim therefor; and the contract was not affected by plaintiffs' failure to point out the boundaries as agreed upon, where defendants declined such services.

¹Reported in 79 Pac. 487.

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Opinion Per HADLEY, J.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered January 29, 1903, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action upon contract. Affirmed.

Danson & Huneke, for appellants.

Hartson & Holloway and *Hamblen & Lund*, for respondents.

HADLEY, J.—Respondents sued appellants to recover upon an alleged contract, whereby it is claimed the former furnished the latter information which enabled them, and certain others, to secure several timber and homestead locations. Appellants deny the contract. The cause was tried before a jury, and a verdict returned in favor of respondents for the sum of \$520. Appellants moved for a new trial, which was denied; and, judgment having been thereafter rendered against them for the amount of the verdict, they have appealed.

The first two assignments of error relate to the introduction of evidence in relation to a witness' knowledge and sources of knowledge as to whether appellants, and others with them, had located upon certain lands. The witness was permitted to state that he saw, upon the records of the land office, that they had filed upon the lands, and, also, that he had seen the advertisements of such filings in a newspaper. This evidence was admitted over the objection that it was not the best evidence. The objection should probably have been sustained, but the error became harmless, for the reason that the proofs were afterwards made from the filing records themselves.

It is assigned that the court should have stricken from the testimony a remark of one of the respondents. The witness had testified that, in the forenoon of a certain day, appellants had made an agreement to pay respondents, and

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Opinion Per HADLEY, J.

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Opinion Per HADLEY, J.

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It is assigned that the court should have stricken from the testimony a remark of one of the respondents. The witness had testified that, in the forenoon of a certain day, appellants had made an agreement to pay respondents, and

that the latter thereupon gave them the information concerning the location and character of the lands, as to the amount of timber, and otherwise; that, following the procurement of such information, and in the afternoon of the same day, appellants undertook to get from respondents an agreement to reduce their price; that respondents refused to reduce the price which they claim was before agreed upon, whereupon one of the appellants said: "Well, you don't own the land," and thereupon the respondent witness said: "Certainly not, but when you were talking in the office I supposed you were honest men. When you had asked questions and we furnish you the information, I thought we were dealing with strictly honest men." The above remark of the witness the appellants sought to have stricken. We think it was not error to refuse the motion. The witness was simply detailing his version of what was said between the parties, on the day of the alleged agreement, and we think it was proper for the jury to know all that was said, in order that they might the better determine the controversy as to whether there was in fact a contract or not.

It is next urged that a remark made by the court during the introduction of testimony was prejudicial as a comment upon the facts in issue. The complaint alleged an agreement to pay respondents a reasonable value for the information and for their services, and that \$65, for each claim located as the result of information furnished by respondents, was such reasonable value. During the examination of a witness, the court said: "I think the evidence clearly shows they agreed upon \$65. The complaint is on *quantum meruit*. The evidence shows express contract. What is the result of that?" The remark, while made to counsel, was in the presence of the jury, and was indeed a comment upon a material and disputed fact. But

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it also partook somewhat of the nature of an interrogation to counsel concerning the relation of the pleadings to the evidence submitted, and we think the error was cured by the court's instructions afterwards given, within the rule followed in *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435. It was made clear to the jury that the fact as to the existence of a contract was disputed, and that it was their province, alone, to determine what the fact in that regard was. Full instructions were given as to the rules governing the burden of proof, preponderance of evidence, and the general duties of the jurors under the issues and evidence of the case.

It is next urged that the court erred in permitting respondents to amend their complaint upon the trial, so as to change the demand from one on *quantum meruit* to one for specific compensation. The amendment was permitted by interlineation, and corresponded with evidence already submitted. The court stated that the amendment would be allowed, unless respondents showed that they would be prejudiced thereby. The record discloses no attempt at such showing, and not even a request for continuance appears. Under such circumstances the court did not abuse its discretion.

It is assigned that the court erred in the following particulars: (1) In overruling appellants' challenge to the sufficiency of the evidence, and in denying their motion to withdraw the case from the jury and enter judgment for them, at the conclusion of the plaintiffs' evidence; (2) in denying appellants' motion, at the conclusion of plaintiffs' testimony, that the court should exclude from the consideration of the jury any claim for compensation on account of timber locations made by certain persons other than appellants—the ground of the motion being the contention that the evidence did not connect the appellants with the loca-

tions of said persons in such a manner as to charge appellants with liability under the contract alleged; (3) in denying appellants' challenge to the sufficiency of the evidence, and their motion to enter judgment for them, made at the conclusion of all the evidence in the case.

The motions above enumerated raised the question of the sufficiency of the evidence for submission to the jury. We have read the statement of facts, and we are satisfied that, in each instance, there was sufficient evidence for the jury. We shall not undertake a general review of the evidence. It is sufficient to say, that there was evidence to the effect that appellants procured from the respondents their first information concerning the claims which were afterwards located; that the locations of appellants, and of the other persons, were made in pursuance of the original information thus derived; and that appellants agreed to pay \$65 per claim therefor. It is contended that the contract as alleged placed upon respondents the obligation, not only to furnish the information, but, also, to go upon the claims with appellants, and to point them out and designate their boundaries; whereas, it is urged that respondents did not go upon the claims and point out the boundaries. The evidence submitted by respondents was, however, to the effect that, after they had furnished appellants the information concerning the location and character of the claims, and as lands open to location, the appellants took the matter into their own hands, and refused to permit respondents to render further services in the premises. It was, therefore, for the jury to say whether the conduct of appellants was such as excused respondents from actually going upon the lands and showing them to appellants. We think the court did not err in denying the several motions and in submitting the case to the jury.

Other assignments of error are based upon the instruc-

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tions given by the court. We think the instructions fairly covered the law under the issues of the case, and that no error was committed therein. We do not believe it would serve any useful purpose to extend this opinion by using the necessary space for a detailed discussion of the points raised on the instructions.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4777. Decided February 9, 1905.]

BARGAE O. LEE *et al.*, Appellants, v. WILLIAM P. WRIXON,
*Respondent.*¹

VENDOR AND PURCHASER—FRAUDS, STATUTE OF—EXECUTION OF VERBAL PROMISE TO CONVEY LAND—PART PERFORMANCE—VESTING TITLE—ATTACHMENT. Where parents outfitted their son for Alaska, he being without means and in debt, and paid off his debts amounting to several hundred dollars, under the verbal promise that, if his venture was successful, he would, out of his first earnings, purchase and present them a farm for a permanent home, and in pursuance thereof, upon returning with \$5,000, he purchased a farm, taking a deed in his own name, and placed his parents in possession, delivering them the deed, and agreeing to execute a deed to them, the transaction is not a gift, but amounts to an executed contract of sale, with the purchase price paid, and there is such a part performance as to take the case out of the operation of the statute of frauds, and vest in the parents all except the bare legal title to the property, so that the same would not be subject to attachment for the debts of the son subsequently contracted.

EXECUTIONS—SALES—BONA FIDE PURCHASER. In this state an attaching creditor acquiring title to his debtor's realty is not a bona fide purchaser, and takes only the debtor's interest.

Appeal from a judgment of the superior court for Snohomish county, Joiner, J., entered April 29, 1903, upon

:Reported in 79 Pac. 489.

findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to set aside a writ of attachment and to quiet title. Reversed.

Fulton & Faben, for appellants.

Robert A. Hulbert, for respondent.

FULLERTON, J.—The appellants are husband and wife, and the respondent is a creditor of their son, John B. Lee. In 1895 the appellants, together with their son, were residing in Snohomish county, in this state, upon a rented farm. They had at that time been within the county some fourteen years, all of the time residing upon rented property, not having been able to acquire a permanent home of their own. During the later years the son had worked on his own account, but without meeting with any success, his latest venture having been the purchase and operation of a hay press, which had but further increased his liabilities. In the year named the son desired to go to Alaska, in the hopes of bettering his fortune in the then newly discovered gold fields of that region, but, being in debt and without means, he was unable to procure the necessary outfit. He thereupon called upon his parents, the appellants, to take care of his debts, and procure him an outfit, promising them that, if he met with success in the venture, he would, out of his first earnings, purchase and present them with a permanent home. The appellants acceded to his request, and, at some sacrifice to themselves, outfitted him for his trip to the north, and assumed, and afterwards paid, his local debts, which amounted to several hundred dollars.

The son met with success, returning in the fall of 1898 with some five thousand dollars. His first act was to make good his promise. He purchased an improved farm in Snohomish county, containing about one hundred and

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thirty-three acres, paying therefor, according to the recitals in the deed, \$4,350. He immediately placed the appellants in possession of the property, and, after the deed had been recorded, delivered that to his mother. The mother noticed that the deed was in the son's name, and called his attention to it, asking for a deed in the name of herself and her husband. The son thereupon promised to deed it over to them, but, as the mother testifies, in the hurry of his preparations for returning to Alaska, he overlooked it. On his return to Alaska the mother wrote him concerning the deed, and received a reply to the effect that, if she would prepare a form of deed for execution and send it to him, he would execute and return it to her. This she did, afterwards receiving it, properly executed.

This deed reached the appellants sometime in 1901. In the meantime, however, the son had become involved in his Alaskan ventures, and, with others, had become indebted to the respondent in this case in the sum of \$1,550. An action was brought on this indebtedness in Snohomish county, in February, 1901, in which an attachment was issued, and levied upon the land above mentioned, as the property of the son, prior to the execution and delivery of the deed from the son to the appellants. A default judgment was afterwards rendered against the son on a service by publication, and an order of sale entered directing the land to be sold for the amount found to be due. A levy was made under this order of sale, and the land duly advertised, whereupon the appellants, learning of the same, brought this action to restrain the sale, and to have the judgment and order of sale set aside. Issue was taken upon the allegations of the complaint, and a trial had, resulting in a judgment for the respondent, the trial judge holding that the land was the property of the son, and subject to sale on execution for the satisfaction of his debts.

In so ruling, we think the learned trial judge erred. The transaction on the son's part was not a mere attempt to make a gift to the appellants. Although the contract was so indefinite as not to be enforceable according to its terms, even had it been in writing and signed by the party to be bound thereby, yet the transaction itself was not one from which no legal obligation whatsoever would arise. On the contrary, the fact that the appellants, at the special request of the son, furnished him with his outfit for his northern venture, and subsequently paid his debts, with the expectation of being remunerated for it, created an implied obligation on the son's part to reimburse them for the money expended, and to pay the reasonable value of their services. When, therefore, the son purchased the farm in question, proffered it to the appellants in satisfaction of this obligation, and they accepted it as such, and entered into possession of it, the transaction was more than a gift; it was a sale of land for a valuable consideration, in which the transaction was so far completed that the purchase price had been paid, and delivery of possession made. Under all the authorities, this is a sufficient part performance of an oral contract to convey lands to take the same out of the statute of frauds. 26 Am. & Eng. Enc. Law (2 ed.), p. 55. And, this being so, it must follow that the appellants had an equitable title to the property the moment they entered into its possession—a title that the courts would change into a legal one by compelling the son to execute a deed conveying it to them.

A creditor who acquires title to his debtor's real property by attachment and sale on execution is not, in this state, a *bona fide* purchaser. He parts with no consideration on account of his purchase, and consequently takes only such interest as the debtor has therein. *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260; *Elwood v. Stewart*, 5

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Wash. 736, 32 Pac. 735; *Benney v. Clein*, 15 Wash. 581, 46 Pac. 1037; *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, 75 Am. St. 841; *Hacker v. White*, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. 945.

As we have shown, John B. Lee, the respondent's judgment debtor, had no beneficial interest in this property whatsoever, at the time the respondent made his levy thereon. He had only the bare legal title, which, uncoupled with a beneficial interest, is not subject to execution. The attempted sale of the land, therefore, by the respondent could do no more than cast a cloud upon the appellants' title, and they were entitled to have the sale enjoined.

The judgment of the lower court is reversed, and the cause remanded, with instructions to enter a judgment in accordance with the first, second, and fourth paragraphs of the complaint.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5345. Decided February 10, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v.
A. A. ARMSTRONG, *Appellant*.¹

TRIAL—EXCLUDING WITNESSES FROM ROOM—WAIVER OF REQUEST. Where the defendant does not insist upon his request to exclude the witnesses from the court room, but leaves it "optional with the court," error cannot be predicated upon the court's failure to exclude them.

HOMICIDE—EVIDENCE IN REBUTTAL—RELEVANCY. Where the state in a prosecution for homicide gave evidence of threats made by the defendant against the deceased, and the defendant in justification made a detailed statement of his troubles with the deceased, rebuttal testimony giving the state's version of such troubles is admissible.

¹Reported in 79 Pac. 490.

CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL—OPINION OF PROSECUTING ATTORNEY. A statement by the prosecuting attorney that the jury will agree with him that "this is the worst homicide that ever occurred in the county," is not objectionable argument because of drawing a comparison with other homicides; nor is it objectionable as an expression of the prosecutor's opinion, since he may state his opinion based upon or deduced from the evidence, when it is not given as independent fact.

CRIMINAL LAW—HOMICIDE—TRIAL—REQUEST FOR SPECIFIC INSTRUCTIONS—ERROR. Upon a prosecution for murder in the first degree, it is not error to fail to define deliberation and premeditation in the instructions to the jury, in the absence of a specific request therefor.

SAME—INSTRUCTIONS TO JURORS INDIVIDUALLY. It is not error to refuse instructions addressed to the jurors individually, and not to the jury as a body.

SAME—INSTRUCTIONS—RELEVANCY. It is not error to refuse instructions having no special application to the case upon points sufficiently covered in the general charge.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 11, 1904, upon a trial and conviction of the crime of murder in the first degree. Affirmed.

W. H. Abel, for appellant, upon the point that it was reversible error for the prosecuting attorney to state his opinion to the jury, cited: 12 Cyc. 577, 580, 581; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592, 27 Am. St. 350; *People v. Dane*, 59 Mich. 550, 26 N. W. 781; *State v. Proctor*, 86 Iowa, 698, 53 N. W. 424.

Sidney M. Heath and *J. A. Hutcheson*, for respondent.

RUDKIN, J.—The defendant was convicted of the crime of murder in the first degree, and prosecutes this appeal from the judgment and sentence of the court. There is no regular assignment of errors in the appellant's brief, but counsel discusses the errors upon which he relies for a reversal of the judgment under five general heads, as fol-

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lows: (1) The refusal of the trial court to exclude the witnesses from the court room during the trial; (2) evidence improperly admitted in rebuttal; (3) improper remarks of counsel; (4) error in instructions given; and (5) error in refusing instructions requested.

(1) At the commencement of the trial counsel for appellant asked that all witnesses not engaged in testifying be excluded from the court room. The court replied that it always desired to comply with such requests when made, but that such compliance would cause delay in the trial, there being no convenient room in which to keep the witnesses, and that, unless counsel especially requested it, the court would allow the witnesses to remain. To this counsel for appellant replied that the matter was optional with the court. Under these circumstances we do not think that the appellant can now claim that his right to have the witnesses excluded was an absolute one, as no such question was presented to, or passed upon by, the court below. A request of this kind is usually granted when made, and no doubt would have been granted in this case, if insisted upon as a matter of right.

(2) The state offered proof of certain threats, made by the appellant against the deceased some three years prior to the commission of the homicide for which the appellant was on trial. While the appellant was on the stand in his own behalf, he denied any knowledge of these threats, and then, as a justification, went into the details of the difficulty between the deceased and himself which gave rise to the threats, if any were made. The appellant then went into a further detailed statement of his other troubles with deceased. The state, over the objection of appellant, introduced testimony in rebuttal, giving the state's version of these troubles and the causes thereof. This testimony was strictly in rebuttal, if admissible at all,

as it constituted no part of the state's case. If these matters had no bearing upon the merits of the case, the appellant was responsible for their intrusion in the record. He was the first transgressor, and cannot complain of the result.

(3) In the course of his argument to the jury, the prosecuting attorney made use of the following language: "I think you will agree with me that this is the worst homicide that ever occurred in the county." This statement is excepted to for two reasons: First, because it compares this homicide with other homicides in the same county; and second, because the prosecuting attorney expressed an opinion as to the guilt of the appellant. We cannot say that the comparison made has any significance whatever in this case. It is true, the prosecuting attorney does, inferentially at least, express an opinion that the appellant is guilty. While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.

"It is not proper for the prosecuting officer to tell the jury that he believes the defendant guilty, as his belief is not evidence in the case; but he has the right to argue from the testimony that the defendant is guilty, and to state to them what evidence before them convinces him, and should convince them, of such guilt. To deny to a prosecuting officer this privilege would be to deny to him the right to place before the jury the logic of the testimony which leads his mind to the inevitable conclusion of guilt, and which he has the right to presume will lead them to the same conclusion, if they view it as he does." *People v. Hess*, 85 Mich. 128, 48 N. W. 181.

In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independ-

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ent fact, and an opinion based upon or deduced from the testimony in the case. We think the fair construction of the language used by the prosecuting attorney in this case is that the testimony led him to the conclusion that the appellant was guilty, and that the jury should reach the same conclusion. There was no impropriety in this.

(4) The appellant excepted to the instruction of the court defining the crime of murder in the first degree, for the reason that the court did not define the words "deliberation and premeditation" therein used. The instruction as given states the law correctly, and, if the appellant desired a more specific instruction on the point suggested, he should have requested it. There was no error in the instruction as given.

(5) The first instruction requested by the appellant was addressed to the jurors individually, and not to the jury as a body. There was no error in the refusal of the court to give this instruction. *State v. Robinson*, 12 Wash. 491, 41 Pac. 884; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Cushing*, 17 Wash. 544, 50 Pac. 512. The other instruction requested was to the effect that a reasonable doubt might arise out of the evidence, or a lack of evidence. This instruction as an abstract proposition is correct; but there is nothing in this case giving the instruction any peculiar or special application, and we think the point was sufficiently covered in the general charge.

A careful examination of the record discloses no error prejudicial to the appellant. The verdict of the jury was amply supported by the testimony, and the judgment of the court is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ.,
concur.

ROOT and CROW, JJ., took no part.

[No. 4704. Decided February 10, 1905.]

W. J. YARWOOD *et al.*, *Appellants*, v. CEDAR CANYON
CONSOLIDATED MINING COMPANY *et al.*, *Respondents*.¹

INJUNCTIONS—POSSESSION OF EQUITABLE TENANT IN COMMON—
PAYMENT OF PROPORTION OF PURCHASE PRICE—ACTION ON BONDS.
Parties who are entitled to become tenants in common of a mineral vein, upon payment of their proportion of the purchase price, have only an inchoate right to possession, and an injunction ousting them is not wrongful in the absence of tender of payment by them, and does not become wrongful by subsequent payment, so as to give rise to any action upon the injunction bond.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 15, 1903, upon the findings of the court and a verdict of a jury rendered in favor of the defendants, dismissing an action on injunction bonds. Affirmed.

Happy & Hindman, for appellants.

Tolman & Kimball, *M. A. Folsom* and *E. C. Macdonald*,
for respondents.

PER CURIAM.—This is an action brought by the appellants against the respondents to recover upon certain injunction bonds. From the record it appears that the respondent Cedar Canyon Consolidated Mining Company brought an action against the appellants, to enjoin them from extracting ores from a certain mineral vein, which the respondent claimed to own, and which was also claimed by the appellants. At the commencement of the action a temporary restraining order was issued, restraining them from mining ore pending a hearing on an application for a temporary injunction, notice of which hearing was given at the time of the service of the restraining order. The ap-

¹Reported in 79 Pac. 483.

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pellants appeared in response to the notice, and contested the issuance of the temporary injunction on the ground that they were the sole owners of the property in question. The court, however, found for the respondent, granting a temporary injunction on the filing of a bond in the sum of \$2,000. Later on the appellants answered in the main action, setting up, in addition to their claim of sole ownership, an equitable claim to two-sevenths of the property, on which they asked affirmative relief, in case their claim to the sole ownership should be determined against them.

On the trial the contest as to the claim of sole ownership was submitted to a jury, and determined against the appellants. The judge thereupon tried the equitable issue, finding that the appellants were entitled to a two-sevenths interest in a part of the claim. Both sides appealed to this court, which modified the judgment below, holding that the appellants were entitled to a two-sevenths interest, as tenants in common with the respondent above named, in the whole of the mineral vein in question, on payment to the respondent of their proportionate share of the purchase price, with interest. After the remittitur went down, this payment was made, and judgment went accordingly, the injunctions theretofore entered being dissolved. The appellants thereupon brought this action upon the injunction bonds, and on judgment going against them, have appealed to this court.

While elaborate briefs have been filed on the part of the appellants, we have found it unnecessary to follow the argument as made therein. The contention of the appellants that the injunction bonds were wrongfully issued, as to them, is based on the finding of the court that they were tenants in common, with the respondent Cedar Canyon Consolidated Mining Company, in the mineral vein, having an equal right with the respondent to its possession;

and hence their ouster at the suit of the respondent was wrongful, and they have the right to recover such damages as they have suffered by the ouster. But the answer is that they had only an inchoate right to the vein, contingent on their paying their proportion of the purchase price; hence they had no right of possession, until they had either paid, or tendered payment of, such purchase price. As they did not pay, nor tender, when the respondent sought to oust them, the injunction was rightfully issued, and it did not become wrongful by their subsequent payment. Affirmed.

[No. 4632. Decided February 10, 1905.]

H. A. HAYES *et al.*, Appellants, v. J. B. RAY *et al.*,
Respondents.¹

APPEAL AND ERROR—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE. Where the finding is supported by substantial evidence, the preponderance of the testimony is for the jury, and the verdict will not be disturbed on appeal. ..

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered December 12, 1902, upon the verdict of a jury rendered in favor of the defendants, dismissing an action for treble damages for the cutting and conversion of timber. Affirmed.

J. C. Cross, for appellants.

W. H. Abel, for respondents.

FULLERTON, J.—In this action the appellants sought to recover from the respondents the value of certain timber, which, it was alleged, belonged to the appellants, and

¹Reported in 79 Pac. 495.

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Opinion Per FULLERTON, J.

which the respondents had cut and removed, and converted to their own use. The land from which the timber was cut, it is conceded, is owned by the respondents. The deed, however, through which they claim title, purports to reserve the title to the timber to the grantors therein, and the appellants claim title thereto by virtue of certain mesne conveyances from such grantors to themselves. The respondents defended on two grounds: (1) that the purported reservation in the deed was void, because inserted therein by some one unknown to themselves, after its execution and delivery; and (2) that they have had the sole and exclusive possession of the property in dispute, claiming adversely to the appellants and all the world, for a period of more than ten years next preceding the commencement of the action. The action was tried out on these issues before a jury, which returned a verdict in favor of the respondents, on which the judgment appealed from was afterwards entered.

The sole contention made by the appellants is that the evidence is insufficient to justify the verdict. An examination of the record, however, convinces us that this contention is not well founded. There was substantial evidence on the part of the respondents in support of both of the contentions set up in their answer, and, although such evidence was contradicted by evidence on the part of the appellants, the question as to the side on which it preponderated was for the jury, and their verdict is conclusive on us here.

The judgment is affirmed.

MOUNT C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4977. Decided February 11, 1905.]

KENT LUMBER COMPANY, *Plaintiff*, v. IRA P. WARD *et al.*,
Defendants.

GALBRAITH, BACON & COMPANY, *Appellant*, v. HATTIE E.
SPITTLE, *Respondent*.¹

MECHANICS' LIENS—INDEMNITY—WAIVER OF LIEN BY CONTRACTOR'S BOND AND AGREEMENT—ASSIGNMENT. Where a contractor gives an indemnifying bond to protect the owner against liens, and also agrees with the surety company to prevent the filing or enforcement of liens against the property, he waives his right thereto, and neither he nor his assignee can enforce a lien against the property.

Appeal from a judgment of the superior court for King county, Rudkin, J., entered October 16, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing a complaint in intervention seeking to foreclose a mechanics' lien. Affirmed.

Roberts & Leehey, for appellant.

George E. de Steiguer, R. R. George, and John P. Hartman, for respondent.

HADLEY, J.—In this action Galbraith, Bacon & Company, a corporation, by way of intervention seeks to foreclose a mechanics' lien. The account was originally held by one Bamberg, and was for labor and material, furnished in the construction of a house for the defendant Hattie E. Spittle. The account, with any right to assert a lien, was assigned by Bamberg to said intervenor, and the latter thereafter filed a notice, claiming a lien. Bamberg was a subcontractor in the construction of the building, one

¹Reported in 79 Pac. 485.

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Ward being the principal contractor. Ward gave to the defendant Hattie E. Spittle, owner of the property, a contractor's indemnifying bond, with the National Surety Company as surety. Ward and Bamberg also gave to said surety company a contract of indemnity, whereby they bound themselves to save the surety company harmless from loss or damage on account of the building contract, and the said bond given to secure it.

The answer denies the material allegations of the complaint, and affirmatively avers the foregoing facts concerning the contractor's bond and the surety indemnifying contract, which are urged as amounting to a waiver by Bamberg of any right to a lien. The cause was tried by the court, and resulted in a judgment denying the lien and dismissing the complaint in intervention. The intervenor has appealed from the judgment.

The principal argument made by appellant is based upon the theory that the court decided the case upon the ground that Bamberg, appellant's assignor, had waived his right to a lien. A remark made by the court, when deciding the case, indicates that such was his theory. It is urged by appellant that there was no evidence upon the subject, and that the court's conclusion is therefore erroneous. It was the court's theory, however, that the facts which it held amounted to a waiver of the right to a lien were admitted by the pleadings. The answer alleged that the contractor's bond was given to protect the owner against liens, and that Bamberg joined in the indemnity contract to save the surety harmless. The reply does not deny the essential facts, but in effect simply alleges that Bamberg never waived his right to a lien.

We think the court was right in its view that the material facts as to the waiver were admitted. The answer alleges that one of the considerations for the contractor's

bond, given to this respondent, was that Ward and Bamberg should give their indemnifying contract. In effect that contract bound them to prevent the filing and enforcement of liens against this property, and yet Bamberg is here through his assignee attempting to enforce a lien in his own behalf. It is true, Bamberg's contract was not with respondent directly, but it was for the purpose of indemnifying respondent's indemnitor concerning the same subject matter. The giving of the indemnity contract to the surety company was, at least, a part of the inducement which led it to protect respondent, and she certainly should not expect that one who was thus obligated would undertake to enforce a lien against her property, which would necessarily create a corresponding liability from himself to another. If he should be permitted to enforce a lien here, respondent must then assert a claim against the surety company, and the latter in turn against Bamberg. In view of all this, we think when Bamberg made a contract to save the surety company from loss, he thereby waived any right to assert a lien in favor of himself. His assignee has no greater rights.

The court appears to have decided the case upon the foregoing theory. No specific finding was made as to whether the lien notice was filed in time or not. But, from the evidence before us, we think the judgment is further sustained on the ground that the lien notice was not filed in time after the completion of the work. The record does not disclose what was the view of the trial court upon that subject, but the point is urged here by respondent, and we believe the weight of the evidence is in favor of her contention.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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Citations of Counsel.

[No. 4796. Decided February 11, 1905.]

OTTO KRICKEBERG, *Appellant*, v. ST. PAUL & TACOMA
LUMBER COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT CAUGHT IN NARROW PASSAGE—ASSUMPTION OF RISKS. An employee engaged in driving a horse and truck load of lumber along a narrow passage way, who is injured by being caught between the load and a post, by reason of depressions in the floor and the slueing of the load, assumes the risks, where all the conditions are open and apparent and well known to him through employment in such service for more than a month.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 16, 1903, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained by an employee in driving a load of lumber through a narrow passage. Affirmed.

Govnor Teats, for appellant, contended that the rule of the assumption of risks does not apply in the case of such a continuing neglect as in this case, but it becomes only a question of contributory negligence. *Patterson v. Pittsburgh R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412; *Southern Pac. R. Co. v. Yeargin*, 109 Fed. 436; *Dwyer v. St. Louis etc. R. Co.*, 52 Fed. 87; *Harder etc. Min. Co. v. Schmidt*, 104 Fed. 282; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091; *Francis v. Kansas City etc. R. Co.*, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440, 4 S. W. 937; *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499; *Hawley v. Northern Cent. R. Co.*, 82 N. Y. 370; *Gunsach v. Schott*, 192 Ill. 509, 61

¹Reported in 79 Pac. 492.

N. E. 332, 85 Am. St. 348; *O'Mellia v. Kansas City etc. R. Co.*, 115 Mo. 205, 21 S. W. 503; *Offutt v. World's Col. Exp. Co.*, 175 Ill. 472, 51 N. E. 651; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Magee v. North. Pac. etc. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. 69; *Martin v. California Cent. R. Co.*, 94 Cal. 326, 29 Pac. 645; *McMahon v. Port Henry Iron Ore Co.*, 24 Hun 48; *Sioux City etc. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724; *Lee v. Smart*, 45 Neb. 318, 63 N. W. 940; *Kearney Elec. Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372, 70 S. W. 519; *Richmond etc. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211, 10 Am. St. 827. The plaintiff was not guilty of contributory negligence. *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. 682; *Snow v. Housatonic etc. R. Co.*, 8 Allen 441, 85 Am. Dec. 720; *Plank v. New York Cent. etc. R. Co.*, 60 N. Y. 607; *Kelleher v. Milwaukee etc. R. Co.*, 80 Wis. 584, 50 N. W. 942; *Bessex v. Chicago etc. R. Co.*, 45 Wis. 477; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Shoemaker v. Bryant Lum. etc. Co.*, 27 Wash. 637, 68 Pac. 380; *McDannald v. Washington etc. R. Co.*, 31 Wash. 385, 72 Pac. 481; *Johnson v. Tacoma Mill Co.*, 22 Wash. 88, 60 Pac. 53.

Reynolds & Griggs, for respondent.

HADLEY, J.—Appellant sued respondent to recover damages for personal injuries, received while working at respondent's lumber mill. Respondent was operating a large mill plant at the place where appellant was working. The mill was more than five hundred feet in length, and more than two hundred feet in width, and consisted of two stories. The lumber was sawed in the upper story, and

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then brought down to the floor of the first story for dressing and other purposes. The length of the mill ran north and south, and the width east and west. There was a line of posts, fourteen by fourteen, running along the sides and ends of the first story, and others were scattered about over the floor of the first story. These posts supported the frame work of the second story. The ground floor was made of thick fir planks.

During the day time, the lumber was sawed in the second story, and loaded upon two-wheeled trucks, which were run down an incline to the ground floor, and there bunched together, not far from the surfacer, where the lumber was to be dressed. Appellant was employed as driver of the horse that hauled these truck loads of lumber from the place where they were left by the day crew along, by and to the front end of the surfacer, as they were needed; and the same horse, also, when driven by appellant, pulled the truck loads of dressed lumber from the tail end of the surfacer out from under the mill into the mill yard. All of this work was done upon the planked floors.

The surfacer and the tables ran north and south. The machine itself was about ten or twelve feet long, and the table upon which the dressed lumber was received from the machine, being at the north end of the latter, was about the same length. The machine and its extension table were fixed to the floor, so that the extreme east side thereof was six feet and six inches from the inside of the east line of posts above mentioned. Along this space was a track, made of small iron rails. This track was constructed so that the rails were let down into the floor, leaving the tops of the rails flush with the surface of the floor. Upon this track, four-wheeled trucks were operated for the purpose of taking lumber from the surfacer into the yard. The distance from the floor to the joists supporting the floor above

was about seven and one-half feet. From each post on the east line, a brace ran up to the corresponding joist, on an angle of forty or forty-five degrees. The east rail of the tramway track was two feet and six inches from the east line of the posts, and the perpendicular distance from the east rail to the above-mentioned braces was five feet and six inches.

The trucks upon which the lumber was loaded had two iron wheels, the rims of which were about three inches in width, and the wheels revolved upon an iron axle. The frame work of the trucks was made of dimension stuff, and was about eight or ten feet long, it being so placed upon the axle that, when the truck was not loaded, one end would just overbalance the other, and rest upon the floor. The extreme width of the trucks was four feet, as represented by the cross beams, and such was also the width of the loads of lumber upon the trucks.

The appellant was furnished with a large draft horse, and was provided with harness, a whiffletree, and a chain. His work was done at night. His method of operation was as follows: He took his horse to the place where the trucks loaded with lumber were bunched, wrapped the chain around the load, and underneath the frame of the truck just forward of the axle and back of one of the cross pieces in the frame, and hooked the chain underneath the load, so that it would pull straight out from the center underneath, the other end of the chain being attached to the whiffletree. He then took his position a little in front of the left hand front corner of the load, facing the horse, put his right hand upon the load and used his left hand to drive the horse. In this manner the load was pulled along over the floor.

The particular load that was being hauled at the time of his injury consisted of two-by-fours, about ten or twelve

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feet long. This load, as was customary, had a scantling stick running out from the bottom of the rear, beyond the end and resting upon the floor, so that the load trailed along on the scantling, thus keeping the whole end of the load from dragging upon the floor. The trucks, having but two wheels, always wobbled more or less, which action, being customary, was known to the appellant. Sawdust, pieces of edging, and other small pieces of wood were frequently upon the floor, and, whenever one of the wheels struck one of these slight obstructions, the truck would slue, more or less, which was a common occurrence, and well known to appellant. In hauling these truck loads, he had daily wound around the above-mentioned posts, and under their braces, and he knew, from the necessary action of the truck, that, if he drove too close to any post and permitted himself to be between the load and a post or its brace, the load was liable to slue and catch him.

The action of the trucks had worn places in the fir floor—not holes through the floor, but mere depressions. These did not materially weaken the floor, but had a tendency to make the trucks wobble. All these depressions were open, apparent, and well known to appellant, during all the time he was engaged at his work, for more than a month immediately preceding his injury. During that time he had, on each night, driven from forty to fifty truck loads along the route, between the surfacer and the east line of the posts aforesaid, and had also driven many loads of dressed lumber out into the yard. It was his custom, when driving between the east line of posts and the surfacer, to put the east wheel of his truck on the inside of the east rail of the tramway track. He knew that this constant running of the truck wheel in one place was wearing the floor down, so that the top of the rail projected above it. At the time of the accident, the projection was

probably an inch and a half, much of which was worn when appellant began working there, and which was at all times open and apparent. The place was well lighted by electric lights. The entire environment above described was in plain view, and was well known to appellant. He was left to his own judgment as to how he should drive. The horse was entirely under his control, and could be driven as he saw fit.

While driving this particular load between the surfacer and a post opposite thereto, he was caught between the load and the post and its brace. He had driven through the same place many times before. His custom in keeping his right hand upon the load was for the purpose of steering it, and, among other things, to cause the load to slue around, and avoid a post, brace, or other obstruction. But he claims that, upon this occasion, the east wheel hit the rail, thus causing the load to slue, by reason of which he was caught and injured. Yet the exact condition he encountered had been long known to him and had at all times been open and apparent.

The foregoing is a somewhat extended but, we believe, comprehensive statement of the facts. We have been assisted much by the thorough and accurate marshalling of the numerous and peculiar details furnished in the briefs of counsel. From a careful reading of the statement of facts, we are satisfied that the above enumeration of facts and circumstances attending appellant's injury is fully verified. The cause was tried before the court and a jury. At the conclusion of the testimony offered by the plaintiff, the defendant moved the court to instruct the jury to return a verdict in its favor. The motion was granted, the verdict returned, and judgment for the defendant was entered upon the verdict. The plaintiff has appealed from the judgment.

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The only question presented here is, did the court err in instructing the jury to return a verdict for the respondent, and in rendering judgment dismissing the action? A further review of the testimony is not necessary. From the facts as hereinbefore stated, it seems to us clear that appellant necessarily assumed the risk of danger from the surroundings, as an incident to his employment, which was to do the particular work he was doing, and at that particular place. He had full knowledge of all the conditions. They were open and apparent. For weeks he had seen the situation daily. There were no dangers from hidden defects. The worn groove by the side of the track, other depressions in the floor, the relative location of the post, brace, and surfacer, and the tendency of the truck to wobble and slue the load upon striking even slight depressions or obstructions, were all known to him. The horse, truck, and load were entirely under his control. He was dependent upon no one else for the manner in which he met the manifest conditions, and which he had encountered hundreds of times before. With full knowledge, he continued to work at the place. He relied upon no promise of respondent to repair or change the surroundings. No statutory duty had been violated by respondent, whereby appellant was relieved from the assumption of the risk, as in the case of *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310. We therefore think that, under many decisions of this court, appellant assumed the risk of danger from a situation which was open and obvious. *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Hogele v. Wilson*, 5 Wash. 160, 31 Pac. 569; *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Brown v. Tabor Mill Co.*, 22 Wash. 317,

60 Pac. 1126; *French v. First Avenue R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Danuser v. Seller & Co.*, 24 Wash. 565, 64 Pac. 783.

We therefore believe the court did not err in directing a verdict for respondent, and in entering judgment thereon.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4849. Decided February 16, 1905.]

JOHN BROWDER *et al.*, *Appellants*, v. NELLIE PHINNEY,
Respondent.¹

LANDLORD AND TENANT—AGREEMENT FOR LEASE—INDEFINITE DESCRIPTION—VALIDITY—PART PERFORMANCE—FRAUDS, STATUTE OF. An agreement to lease premises which are indefinitely described, signed only by the agent of the owner, is not enforceable as a lease without a part performance sufficient to take the same out of the operation of the statute of frauds.

PLEADINGS—FRAUDS, STATUTE OF—PART PERFORMANCE OF LEASE—ADMISSIONS OF ANSWER. In an action for the reformation of a contract for a lease, which was void under the statute of frauds without part performance by the taking of possession, an answer affirmatively alleging a termination of what plaintiffs claimed to be a tenancy does not admit the taking of possession thereunder, where such taking was first specifically denied.

FRAUDS, STATUTE OF—INDEFINITE LEASE—EVIDENCE AS TO PART PERFORMANCE. Upon an issue as to whether there was part performance of an agreement for a lease by the taking of possession thereunder, evidence on behalf of the defendant is admissible to show the circumstances surrounding its execution, especially where the plaintiff seeks a reformation of the contract.

CONVERSION—RETURN OF PROPERTY—INSTRUCTIONS. In an action for the conversion of personal property, it is proper to refuse to instruct that a failure to return the goods to the place from which they were taken would authorize a verdict for the plaintiffs,

¹Reported in 79 Pac. 598.

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since a return was tendered to the plaintiffs at another place and the goods stored in a warehouse in their name, which negatives a conversion.

LANDLORD AND TENANT—TERMINATION OF TENANCY—EVIDENCE. A termination of the tenancy is sufficiently shown by evidence to the effect that repairs were begun and \$2,000 expended by the landlord after the tenants stated that they did not wish to longer retain the premises.

Appeal from a judgment of the superior court for King county, Bell, J., entered June 13, 1903, upon the verdict of a jury rendered in favor of the defendant, after a trial on the merits, dismissing an action for damages for an eviction and a conversion of personal property. Affirmed.

S. S. Langland and James E. Bradford, for appellants.
Piles, Donworth & Howe, for respondent.

HADLEY, J.—This action was brought by appellants against respondent to secure the reformation of a written instrument, claimed to be a lease, and to recover damages. it being alleged that such damages resulted from a wrongful eviction of appellants from the leased premises, and from a conversion of certain personal property. The instrument relied upon as amounting to a lease is as follows:

“August 31st, 1899.

“I hereby agree with Browder & Compton to lease store rooms 1202 and 4 for a term of three years from Oct. 1st 1899 at a monthly rental fifty dollars first year, seventy five dollars second year and one hundred dollars monthly per last year of said lease.

“Mrs. Nellie Phinney, By Daniel Jones, Agt.”

It is alleged that, by inadvertence and mistake, the premises were imperfectly described, in that “1204” was intended to be inserted in place of the figure “4”, and also that the words “First Avenue, City of Seattle,” were omitted; that it was intended that the description should

read, "Rooms 1202 and 1204, First Avenue, City of Seattle." It is asked that the instrument shall be reformed in the above particular. It is alleged that appellants took possession of the premises under and in pursuance of said written instrument, and that they so remained in possession, until they were wrongfully evicted by respondent. The damages by reason of being deprived of the use of the premises are laid at \$2,400, and for conversion of the personal property at \$500. Other incidental damages are also alleged. The answer denies that there was any lease and tenancy as alleged, but admits the execution of the written instrument set out above. It also affirmatively alleges that appellants agreed with respondent that the tenancy which the former claimed by virtue of said written instrument should be terminated, and that such alleged tenancy was thereby terminated. The conversion of the personal property is denied. The cause was tried before the court and a jury, and resulted in a verdict for the defendant. Judgment was thereafter entered dismissing the action. The plaintiffs have appealed.

A number of assigned errors relate to the alleged improper admission of evidence, and are based upon the contention that evidence was improper to show the circumstances under which the above quoted written instrument was signed by the agent of respondent. The instrument does not purport upon its face to be a lease. It is no more than an agreement to lease premises which are indefinitely described, and which cannot be identified from the description itself. It is not signed by appellants, and does not purport to obligate them as lessees. Relief could not, therefore, be obtained by virtue of the instrument alone on the theory that it constituted a lease. In order to obtain the relief sought, and as growing out of this instrument, it was therefore necessary for appellants to estab-

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lish a part performance of it. Such, we think, was made clear by this court in its opinion when this cause was here before. See *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264. In order to establish part performance, it was necessary for appellants to show that their possession of the premises was taken under the instrument sued upon. That fact was in issue under the pleadings. Respondent claims that appellants' occupancy was initiated some time before the execution of the instrument. Appellants urge that respondent's answer admits that possession was taken by virtue of the writing—notwithstanding it is first specifically denied—in that it is claimed the answer alleges that the tenancy under the lease was, by agreement, terminated. We do not so understand the answer. It is alleged that what appellants claimed as a tenancy under the writing was terminated by their own act; but it is not admitted to have been such a tenancy, and is referred to only as an alleged tenancy. If the possession of appellants was not referable to the instrument in suit, or if their occupancy was but the continuance of a possession which existed prior to the signing of the instrument, then there was no such part performance as would take the case out of the statute of frauds. Inasmuch as it was necessary to show that possession was taken under this instrument, in order to establish part performance, it follows that evidence was admissible to show the circumstances surrounding the execution of the instrument, so that the jury might determine whether, by the instrument, the parties contemplated a change of possession, or whether it was executed for an entirely different purpose. Furthermore, appellants do not stand upon the instrument as written, but they ask that it be reformed, and that they be awarded relief upon it as reformed. They therefore claim the right to introduce parol evidence for the purpose

of showing what the true agreement was. Such being true, they are not in a position to object to the introduction of evidence to show the circumstances under which the writing was made. The court did not err in this particular.

It is assigned that the court erred in not giving to the jury appellants' requested instruction number 5. The requested instruction related to appellants' right to recover the value of the goods which it was claimed were converted, and was as follows:

"You are also instructed that, if you find that plaintiffs were wrongfully dispossessed of said premises and their goods were put out and carted away by the defendants against the consent of plaintiffs, and were never put back again to the place from which she took them, then you will assess as special additional damages in such an amount as the said goods were at that time reasonably worth."

Such an instruction would have been erroneous, even if there had been evidence to sustain a finding of conversion. It assumes a state of facts that does not constitute conversion. It merely comprehends a taking from the premises without consent, and a failure to return the goods to the place from which they were taken. It would require the jury to find that there was a conversion, and to return damages for the full value of the goods, even though they might have been actually returned to appellants at some other place than that from which they were taken. The undisputed evidence in the case shows that that was just what occurred. Respondent caused the goods to be carefully loaded upon a dray, and taken to the place of business of Browder & Compton, of which firm the appellant Browder was a member. An effort was made to place the goods in Mr. Browder's place of business, but he refused to permit it. This was followed by an effort to place them upon the sidewalk in front of Browder's place of business, but the latter admits that he stood upon the side-

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walk with a loaded shot gun and threatened to shoot any man who placed the goods there. Thereafter respondent caused the goods to be stored in a warehouse in appellants' names. Such was not a conversion. The evidence of appellant Browder himself negatived any attempt to convert the property. *Sparks v. Purdy*, 11 Mo. 142; *Shea v. Milford*, 145 Mass. 525, 14 N. E. 769. Appellants, being bound by that testimony, were not, therefore, entitled to have the matter of conversion submitted to the jury, and in no event would they have been entitled to the erroneous instruction asked.

Errors are urged upon the instructions that were given, but we think they fully and fairly covered the issues, and that the law of the case was properly stated to the jury.

It is urged that it was error to deny the motion for new trial, for reasons already discussed, and, also, on the ground that the verdict is not sustained by the evidence. The weight of the evidence was for the jury. The issue was squarely made, both in the pleadings and evidence, that appellants agreed upon the termination of any tenancy they may have had. Even though their occupancy may have been referable to the written instrument in suit, yet there was direct and positive evidence to the effect that Browder, who spoke for the appellant firm, agreed upon a termination of appellants' tenancy. The testimony was that respondent's agents inquired of Browder as to whether appellants intended to retain the premises any longer, and, if not, they informed him that respondent desired to make extensive improvements; that Browder replied that appellants did not intend to retain the premises longer, and that respondent could do with them as she pleased. Thereupon respondent entered upon the premises, and proceeded to make general changes and improvements to the value of about \$2,000. Meantime a few of appellants' goods re-

mained in the building, and it was the removal of those, in the manner aforesaid, which appellants claim was a conversion. If the jury believed the above testimony, it was sufficient to sustain a verdict for respondent, on the ground that appellants cannot now be heard to say that they did not agree upon a termination of their tenancy, no matter whether it was initiated by the written instrument in suit, or otherwise.

The verdict being sufficiently sustained by evidence, we shall not disturb it.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5450. Decided February 16, 1905.]

WILLIAM RITTERHOFF *et al.*, Respondents, v. THE PUGET
SOUND NATIONAL BANK OF SEATTLE, Appellant.¹

EQUITY—BILLS AND NOTES—JURISDICTION TO CANCEL FORGED NOTES. Equity has jurisdiction of an action brought to cancel a joint note, alleged by the plaintiffs to be a forgery, although the same may be past due, especially where one of the plaintiffs is an invalid, since there is danger of losing the evidence upon which the action is based before any adequate remedy at law can be obtained; and Bal. Code, §§ 6034-6038, providing for the perpetuation of testimony does not furnish effective means for preserving the evidence, or any adequate relief against the annoyance of such an outstanding claim.

SAME—PARTIES. In an action to cancel a joint note brought by two of the parties whose names purport to be signed thereto, on the allegation that their signatures were forged, the representatives of a third signer, since deceased, are proper but not necessary parties plaintiff.

Appeal from a judgment of the superior court for King county, Bell, J., entered September 20, 1904, upon over-

¹Reported in 79 Pac. 601.

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ruling a demurrer to the complaint, granting a permanent injunction as prayed for in the complaint. Affirmed.

Carr & Preston, for appellant. The plaintiffs have an adequate remedy at law. *Shenehon v. Illinois Life Ins. Co.*, 100 Ill. App. 281; *Grand Chute v. Winegar*, 15 Wall. 373; *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okl. 578, 64 Pac. 8; *Geer v. Kissam*, 3 Edw. Ch. 129; *Drexel v. Berney*, 122 U. S. 241, 7 Sup. Ct. 1200; *Hairalson v. Carson*, 111 Ga. 57, 36 S. E. 319; *Field v. Holbrook*, 14 How. Pr. 103; *Globe Mut. Life Ins. Co. v. Reals*, 79 N. Y. 202; *San Diego Flume Co. v. Souther*, 90 Fed. 164; *Town of Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Black v. Miller*, 173 Ill. 489, 50 N. E. 1009; *Shorman v. Hurd*, 107 Ill. App. 471; *Erickson v. First Nat. Bank*, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. 753; *County of Ada v. Bullen Bridge Co.*, 5 Idaho 188, 47 Pac. 818, 95 Am. St. 180; *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46, 26 Atl. 965; *Vannatta v. Lindley*, 98 Ill. App. 327. Danger of loss of testimony is not ground for the interference of equity, where there is a statutory procedure for perpetuating testimony. *Town of Springport v. Teutonia Sav. Bank*, *Town of Venice v. Woodruff* and *Globe Mut. Life Ins. Co. v. Reals*, *supra*; *Fowler v. Palmer*, 62 N. Y. 533; *Allerton v. Belden*, 49 N. Y. 373; *Brown v. Boyd*, 158 Mass. 470, 33 N. E. 568; *Loggie v. Shandler*, 95 Me. 220, 49 Atl. 1059; *Erickson v. First Nat. Bank* and *Shenehon v. Illinois Life Ins. Co.*, *supra*; *Wilkes v. Wilkes*, 4 Edw. Ch. 630.

Robert H. Lindsay, for respondents.

CROW, J.—This is an action in equity to enjoin appellant from asserting any demand against respondents, or either of them, upon a certain pretended promissory note,

or in any manner transferring or indorsing the same. The complaint, which was verified on February 12, 1904, in substance alleges, that the plaintiff William Ritterhoff is an unmarried man, a resident of Seattle, King county, Washington; that he has been, at all the times mentioned in the complaint, and still is, an invalid, suffering from paralysis; that he owns real and personal property within King county, Washington, of the reasonable value of \$75,000; that plaintiff Lena Krug is a widow, and has real and personal property within King county, Washington, of the value of \$7,000; that, ever since the 15th day of January, 1903, the said defendant has been, and still is, asserting that it of right has and holds a certain claim and demand against said plaintiffs for the sum of \$5,000, by virtue of a pretended promissory note, purporting to be executed by one Adolph Krug, now deceased, and also by the said plaintiffs, William Ritterhoff and Lena Krug, as joint and several makers, and that said note is now in the possession of the defendant; that said defendant, by written notice, has, prior to the commencement of this action, demanded payment of said note from plaintiffs, and from each of them; that the names of plaintiffs, as appearing on said pretended note as their signatures, are each of them false, fraudulent, and forgeries, and that plaintiffs did not, nor did either of them, ever execute, or authorize the execution of, said note; that, prior to the commencement of this action, plaintiffs, and each of them, notified defendant that, as to them and each of them, said pretended note was false, fraudulent, and a forgery, and that, notwithstanding said notification, said defendant still claims to hold said note as a valid demand against said plaintiffs, and each of them; that said plaintiffs never, at any time, received any consideration for said pretended note. Plaintiffs also allege danger of irreparable damage,

that they have no speedy or adequate remedy at law, and pray equitable relief as above stated.

To this complaint appellant interposed a general and special demurrer, which being overruled, appellant elected to stand upon its demurrer, and declined to plead further. Thereupon a decree was rendered in accordance with the prayer of the complaint, adjudging said note, as against respondents, to be false, fraudulent, a forgery, and null and void, and forever enjoining and restraining appellant from asserting any demand against respondents, or either of them, upon said pretended note, and from transferring or dealing with said pretended note, as against respondents, or either of them. From said final judgment and decree this appeal is taken.

The only ground of demurrer seriously urged upon this appeal is that the complaint does not state a cause of action. Appellant contends a court of equity has no jurisdiction, for the reason that respondents have an adequate remedy at law—urging that, from the facts alleged in the complaint, it clearly appears that, as soon as appellant shall bring its action upon said note, it will only be necessary for respondents to deny the execution of the note, and thereupon appellant will be put upon proof of the genuineness of the disputed signatures.

For the purposes of the demurrer, it is admitted that the pretended signatures are forgeries. It does not clearly appear from the complaint that the note has matured, although possibly its maturity may be inferred by reason of demand for payment having been made. Appellant urges, that a forged note is void, always and everywhere; that it cannot bind the alleged maker, in the hands of a *bona fide* purchaser, either at common law or under our statute (Laws 1899, p. 345, § 23); that the note is past due, and, even if genuine, has passed the day of innocent

purchase; that, therefore, drawing proper deductions from the allegations of the complaint, the note in suit can never be collected from respondents, and that, in the event appellant should attempt to collect it from them by action at law, they would have nothing to do but deny its execution.

In defining the jurisdiction of courts of equity, it is a well established principle that equity will not relieve when there is a full, adequate, and complete remedy at law. To deprive such courts of jurisdiction, it is not sufficient that there may be some remedy at law which may be enforced, at some indefinite time in the future, but such remedy must be plain, adequate, and complete.

"In general, courts of equity will not assume jurisdiction, where the powers of the ordinary courts are sufficient for the purposes of justice. And, therefore, it may be stated as a general rule, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law as in a court of equity, and that remedy is direct, certain, and adequate, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold. But where there is a clear right, and yet there is no remedy in a court of law, or the remedy is not plain, adequate, and complete, and adapted to the particular exigency, then and in such cases courts of equity will maintain jurisdiction." Story, *Equity Pleading* (10th ed.), § 473.

"The remedy at law which precludes relief in equity must be as practical and efficient to the ends of justice and its *prompt* administration as the remedy in equity." Fletcher, *Equity Plead. & Prac.*, § 208.

See, also, *Boyce's Executors v. Grundy*, 3 Pet. 210, 7 L. Ed. 655.

The supreme court of Indiana, in the case of *Otis v. Gregory*, 111 Ind., at page 511 (13 N. E., at page 42), says:

"Whatever may have been formerly held in other jurisdictions in respect to the cancellation of void contracts, the doctrine that a party to an instrument, which is of no legal force or validity whatever, may ask the aid of a court of equity in procuring its surrender and cancellation, is now fully set at rest here. It is regarded as against conscience, that one party should persist in holding a dead or other instrument against another of which he can make no possible use except as a means of embarrassing his adversary. . . . 1 Story, Equity Jurisp., § 700; 3 Pomeroy, Equity Jurisp., § 1377."

What is the practical effect of the remedy at law which appellant contends respondents have in this action? Simply to permit present conditions to remain entirely undisturbed, to allow appellant to continue holding said note against respondents as a possible cause of action at law, to sue or not sue thereon as it (appellant) may elect, to keep or dispose of said note at appellant's pleasure while respondents await an indefinite opportunity at some future time to interpose the defense of forgery in an action at law commenced by appellant, or its possible assignee.

From the allegations of the complaint, it appears that respondent Ritterhoff is in poor health. Death is liable to come to any person, at any time, and more immediate liability exists in the case of an invalid. Respondents' estates may become involved by reason of this note. Adolph Krug, one of the alleged joint and several makers, is now dead, and his evidence can never be obtained. Other evidence, now available and in existence, may be forever lost. Respondents' credit may be continuously affected, or injured, by reason of the existence of this claim; for appellant, at its election, may continue to hold the note and assert a claim thereon for an indefinite period, and then commence an action at law for its enforcement immediately prior to such time as the note would be barred

by the statute of limitations. Under such circumstances, would respondents have, at all times, a plain, adequate, and complete remedy at law, accompanied by a prompt administration of justice? If they would, the court had no equitable jurisdiction, and the demurrer should have been sustained. If not, there was no error in overruling the demurrer.

Appellant cites numerous cases, placing special reliance upon the following: *Shenehon v. Illinois Life Ins. Co.*, 100 Ill. App. 281; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174; *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okl. 578, 64 Pac. 8; *Geer v. Kissam*, 3 Edw. Ch. 129. In *Shenehon v. Illinois Life Ins. Co.*, *supra*, an equitable action was brought for the purpose of compelling the cancellation and surrender of two life insurance policies. It appeared, however, that the assured had died prior to the commencement of the action; that the policies claimed to have been fraudulently obtained were in the possession of the beneficiary; and that, under the terms of said policies, suit would have to be instituted within one year from the date of death of the assured, or action thereon would be barred. At the time of the commencement of the action, substantially one-half of this period had expired. It being therefore evident that an action at law upon the policies would have to be commenced within six months, or be barred, the court held it had no equitable jurisdiction to compel the surrender and cancellation of the policies, and thereby deprive the beneficiary of the right to a trial by jury.

In *Grand Chute v. Winegar*, *supra*, an action in equity was commenced by the town of Grand Chute, in Wisconsin, to compel the cancellation of certain bonds. It appeared, however, that, at the time of the filing of the bill in equity, an action at law had already been commenced on

the bonds, by the holders thereof; and it was properly held that a court of equity had no jurisdiction.

In *Trimble v. Minnesota Tresher Mfg. Co.*, *supra*, an action in equity was commenced for the purpose of securing the surrender and cancellation of certain notes, given by the plaintiff to the defendant, a manufacturing company, for the purchase price of certain machinery. The plaintiff claimed said notes to have been fraudulently obtained, but did not deny their execution, nor allege defendant to be insolvent. Under these circumstances the court held it had no equity jurisdiction. We think that case does not, in the facts involved, at all resemble the one at bar.

In *Geer v. Kissam*, *supra*, it was held, that although equity may have a right to decree the surrender of a promissory note, yet, where an action has been brought upon said note, and a bill is filed to aid discovery, and such discovery is given, and the case appears to be such that the party complainant has a defense at law, and evidence to support it, an injunction which restrained such action at law will be dissolved. Counsel for appellant also cites the case of *Field v. Holbrook*, 14 How. Pr. 103, in which Duer, J., makes the following analysis of the circumstances under which a court of equity will act, in ordering instruments in writing to be delivered up and cancelled:

"(1) When the plaintiff alleges that the instrument which he prays may be surrendered or cancelled is void upon grounds of which a court of equity alone can take cognizance, in fewer words when he sets up a purely equitable defense. (2) When the instrument is a deed or other document concerning real estate, which, although inoperative if suffered to remain uncanceled, would throw a cloud upon the plaintiff's title to the lands which it embraces, or to which it refers. (3) When the instrument is negotiable in its character, as a bill of exchange, and the putting it into circulation by the holder would be a

fraudulent act. (4) Where the plaintiff claims to have a defense valid in law, but which rests upon evidence which he is in danger of losing, if the adverse party is suffered to delay the prosecution of his claims."

In our opinion, the fourth subdivision above stated is amply sufficient to confer equity jurisdiction in this case. It is easy to understand how respondents may be in danger of losing evidence, should the adverse party be suffered to delay prosecution of its claims.

Appellant contends that no case is made by the complaint, showing a probable loss of evidence, and that, even if the facts were otherwise, ample protection is afforded respondents to anticipate any such possibility by perpetuating testimony, in the manner provided by Bal. Code, §§ 6034 to 6038. While it is true that the sections referred to provide a method by which testimony of any witness may be taken and perpetuated for future use, nevertheless, we think they do not afford respondents all relief to which they are entitled. There is no provision in said statute giving authority to require the production of the note in question, and, even if such production could be obtained, it is apparent, from the nature of the anticipated defense against said note, that testimony of the respondents, taken under said statute, would not be as effective in establishing forgery as would the oral evidence and the personal presence of the parties whose purported signatures appear on the note. In any event, though satisfactory testimony could be perpetuated, we think respondents should not be compelled to submit to the delay and annoyance of having a fraudulent note outstanding and constantly urged against them as a valid claim, with no certainty as to when an action may be commenced thereon.

Under the peculiar facts of this case, as shown by the allegations of the complaint, respondents did not have

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any remedy at law, as practical and efficient, to the ends of justice and its prompt administration, as their remedy in equity. The lower court had equitable jurisdiction, and properly overruled the general demurrer. *Sharon v. Hill*, 20 Fed. 1; *Sharon v. Terry*, 36 Fed. 337, 1 L. R. A. 572; *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592; *Huston v. Roosa*, 43 Ind. 517; *Fuller v. Percival*, 126 Mass. 383.

Appellant, in its special demurrer, urges a defect of parties defendant, and assigns error thereon, insisting that the personal representatives of Adolph Krug, deceased, are necessary parties to the adjudication sought in this action. It is contended by respondents that this question was not raised in the lower court. While this perhaps may be true, such fact does not properly appear in the record. We are of the opinion, however, that while the representatives of Adolph Krug, provided he left an estate and any such representatives have been appointed and qualified, might be proper parties to the action, they are not necessary parties.

We find no error in the record, and the judgment of the superior court is therefore affirmed.

MOUNT, C. J., DUNBAR, and RUDKIN, JJ., concur.

ROOT, J., not voting.

HADLEY and FULLERTON, JJ., took no part.

[No. 4938. Decided February 17, 1905.]

WILLIAM WADHAMS *et al.*, Appellants, v. PORTLAND,
VANCOUVER & YAKIMA RAILWAY COMPANY,
*Respondent.*¹

BILLS AND NOTES—ORDERS—ACCEPTANCE IN WRITING—COMPLAINT—SUFFICIENCY. A complaint in an action upon an order or bill of exchange is insufficient, and a demurrer thereto is properly sustained for want of sufficient facts, where it fails to allege that the acceptance of the order by defendant was in writing, under Laws 1899, p. 363, §127, providing that there shall be no liability until the drawee has accepted the bill, and (§ 132) that such acceptance must be in writing.

Appeal from a judgment of the superior court for Clarke county, Miller, J., entered July 22, 1903, upon sustaining a demurrer to the complaint, in an action upon an order. Affirmed.

Cotton, Teal & Minor and *W. C. Bristol*, for appellants. The order constitutes an equitable assignment and transferred to the appellant any funds belonging to the construction company then in the possession of the respondent. Bal. Code, §§ 4793, 4835; *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381; *Barlo v. Seattle etc. R. Co.*, 28 Wash. 179, 68 Pac. 442. Formerly there were two well supported conflicting rules on this subject, viz: First, that a bill of exchange of itself operates as an equitable assignment of funds in the hands of the drawee, without designating the funds. *Kahnweiler v. Anderson*, 78 N. C. 143; *Lee v. Robinson*, 15 R. I. 369, 5 Atl. 290; *Blin v. Pierce*, 20 Vt. 25; *Gardner v. National City Bank*, 39 Ohio St. 600; *Fonner v. Smith*, 31 Neb. 107, 47 N. W. 632, 28 Am. St. 510; *Brady v. Chadbourne*, 68 Minn. 117, 70

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Citations of Counsel.

N. W. 981; *Foss v. Five Cents Sav. Bank*, 111 Mass. 285; *Moore v. Robinson*, 35 Ark. 293. Second, that a bill of exchange operates as an equitable assignment only under special circumstances, and when the fund is designated. *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 17 N. E. 671; *Fourth St. Nat. Bank v. Yeardley*, 165 U. S. 634, 17 Sup. Ct. 439; *First Nat. Bank of Canton v. Dubuque etc. R. Co.*, 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280; *Bank of Commerce v. Bogy*, 44 Mo. 13, 100 Am. Dec. 247; *Ehrichs v. De Mill*, 75 N. Y. 370; *Noe v. Christie*, 51 N. Y. 270; *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; *Des Moines County v. Hinkley etc.*, 62 Iowa, 637, 17 N. W. 915; *Papineau v. Naumkeag etc. Co.*, 126 Mass. 372; *Sears v. Lawrence*, 15 Gray (Mass.) 267; *Rogers v. Union Stone Co.*, 130 Mass. 581, 39 Am. Rep. 478; *Coyle's Executrix v. Saterwhite's Adm'r*, 4 T. B. Mon. (Ky.) 124; *Bull v. Bank of Kasson*, 123 U. S. 105, 8 Sup. Ct. 62; *Wadlington v. Covert*, 51 Miss. 631. The object of the negotiable instrument law was not to entirely change the law, but to harmonize the general law by adopting the second rule, and by obviating such conflicts between the state and federal jurisdictions as is illustrated by *Coddington v. Bay*, 20 Johns. 637, 11 Am. Dec. 342, and *Swift v. Tyson*, 16 Peters 1; or by *Coulter v. Richmond*, 59 N. Y. 478, and *Good v. Martin*, 95 U. S. 90. In no jurisdiction has it ever been held that a bill of exchange could not under any circumstance operate as an equitable assignment. Byles, Bills and Notes (8th ed., Wood's), pp. 31, 32; Daniel, Negotiable Inst. (3d ed.), pp. 15-23; Tiedeman, Commercial Paper (1889), pp. 4-18. The negotiable instrument law was not intended to render void all equitable assignments not manifested in

the form of a bill of exchange. *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749. Under the special circumstances alleged there was an equitable assignment and an established privity between the plaintiff and the railroad company, absolutely binding the company to properly apply the funds in its hands. *McDaniel v. Maxwell*, 21 Ore. 202, 27 Pac. 952, 28 Am. St. 740; *Willard v. Bullen*, 41 Ore. 25, 67 Pac. 924, 68 Pac. 422; *Wadhams & Co. v. Inman, Poulsen & Co.*, 38 Ore. 143, 63 Pac. 11; *Erickson v. Inman*, 34 Ore. 44, 54 Pac. 949; *Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433; *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709; *Central Nat. Bank of Pueblo v. Spratlen*, 7 Colo. App. 430, 43 Pac. 1048; *Ruple v. Bindley*, 91 Pa. St. 296; *McLellan v. Walker*, 26 Me. 114; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; *Beaumont Lumber Co. v. Moore* (Tex. Civ. App.), 41 S. W. 180; *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. 467; *Doty v. Caldwell* (Tex. Civ. App.), 38 S. W. 1025; *Hutchinson v. Simon*, 57 Miss. 628; *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; *Lowery v. Steward*, 25 N. Y. 239, 82 Am. Dec. 346; *Izzo v. Ludington*, 79 N. Y. Supp. 744; *Warren v. First Nat. Bank*, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; *Griggs v. St. Paul*, 56 Minn. 150, 57 N. W. 461; *Slobodisky v. Curtis*, 58 Neb. 211, 78 N. W. 522; *Thomas v. Exchange Bank*, 99 Iowa 202, 68 N. W. 780, and cases *supra*.

B. S. Grosscup, for respondent.

DUNBAR, J.—The complaint alleges, in substance, that the defendant, the Portland, Vancouver & Yakima Railway Company, and the Western Construction Company, as parties of the first and second parts respectively, entered into a contract or agreement in writing, whereby, among other things, the Western Construction Company agreed to

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execute, construct and finish the clearing and grubbing and other works necessary to prepare a road bed and structure for the reception of the ties and rails on a certain part of the railway of the Portland, Vancouver & Yakima Railway Company, in the state of Washington; that thereafter the Western Construction Company entered upon the performance of its contract, and that the plaintiffs supplied said Western Construction Company with provisions, at its instance and request, aggregating the agreed value of \$1,718.60; that thereafter the Western Construction Company issued and delivered to the plaintiffs its written order and assignment of moneys due it from and upon the Portland, Vancouver & Yakima Railway Company, wherein and whereby it set over, and directed to be paid, to plaintiffs, and their order, the sum of \$1,718.60, in full of all accounts and moneys, then in the hands of the Portland, Vancouver & Yakima Railway Company, due and to become due to it, said Western Construction Company; that thereafter the plaintiffs presented said order to the Portland, Vancouver & Yakima Railway Company, and demanded payment of the same, and the said Portland, Vancouver & Yakima Railway Company did receive and accept said order, and promised and agreed with said plaintiffs to retain, out of the money due and to become due to the Western Construction Company under said contract, and to pay the plaintiffs, the sum of \$1,718.60, the amount of said order; that, at the time said order was presented, there was money due and to become due, to the construction company from said railway company, a sum largely in excess of the said sum of \$1,718.60; that thereafter, with full notice and knowledge of the fact that the plaintiffs were the holders of said order, and the assignees of the Western Construction Company to the amount thereof, the Portland, Vancouver & Yakima Railway Company set-

tled with the Western Construction Company, and paid to it, and upon its order, large sums of money, the exact amount of which these plaintiffs do not know, but allege that the sums so paid were more than sufficient to cover the amount of said order of plaintiffs, and in a sum greater than \$1,718.60; that the plaintiffs have frequently demanded payment of said sum of \$1,718.60 from the Portland, Vancouver & Yakima Railway Company; that said defendant has withheld the same, and has not paid the said sum, nor any part thereof. To this amended complaint the defendant demurred, on the ground that it appears upon the face thereof that the said amended complaint fails to state facts sufficient to constitute a cause of action against the defendant. The demurrer was sustained by the court and, the plaintiffs declining to plead further, the judgment was entered dismissing the cause; from which judgment this appeal is prosecuted.

A very earnest and learned brief is filed by the appellants in this case, to sustain their claim that the court erred in sustaining the demurrer interposed to the complaint. But we think the judgment of the court is sustained by the case of *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749. Section 127, p. 363, of the Laws of 1899, in the interpretation of bills of exchange, provides that a bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same; and § 132 defines acceptance in the following language:

"The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee."

In *Nelson v. Nelson Bennett Co.*, *supra*, the action was upon an unaccepted order for the payment of money. In

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Syllabus.

that case there was an attempt to support the order described in the complaint by an allegation to the effect, in substance, that there was a contract between the drawer and the drawee, by the terms of which the drawer agreed to pay for the work in orders, and that the order in question was drawn in pursuance of that contract. Upon this statement in the complaint, it was assumed by this court, without deciding, that the allegation might support the action stated; but when the whole record was presented, and it was found that the allegation of the complaint relating to the contract was not supported by competent proof, and that all that was left as a basis of the action was the unaccepted order, it was held that no cause of action existed, for the reason that the demands of the statute had not been met by an acceptance of the order in writing.

We are satisfied with that decision, and the judgment in this case will, therefore, be affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5476. Decided February 17, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. JACKY SMOKALEM, *Appellant*.¹

INDIANS—CRIMINAL LAW—OFFENSE COMMITTED ON RESERVATION—INDIANS NOT SUSTAINING TRIBAL RELATIONS—COURTS—JURISDICTION OVER ALLOTTED RESERVATION. The state courts have jurisdiction over homicides committed by one Puyallup Indian against another on the Puyallup Indian reservation, it appearing that the reservation had been allotted in severalty, all restrictions against alienation removed, and no agency or government control maintained, and that the Indians thereon had maintained no tribal relations for years, but were qualified electors and had adopted the customs, laws and precinct offices of the Whites, since Act Cong.,

¹Reported in 79 Pac. 603.

23 Stat. 385, conferring jurisdiction of such offenses upon the federal courts applies only to Indians sustaining tribal relations.

TRIAL—JURORS—MISCONDUCT. A conversation between a juror and a deputy sheriff, which has no relation to the case, is not misconduct amounting to ground for a new trial.

CRIMINAL LAW—TRIAL—IMPROPER ARGUMENT—COMMENT ON FAILURE TO TESTIFY. Remarks of the prosecuting attorney in argument asking why they have not explained certain incriminating circumstances, and stating that it was easy for them to do so, should be construed as addressed to the argument of opposite counsel and not a comment on the failure of the accused to testify, which is forbidden by implication by the statute.

SAME. The prosecuting attorney may comment on the failure to explain incriminating circumstances, although in part they might have been explained by the accused, when he does not comment on the failure of the accused to testify.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 26, 1904, upon a trial and conviction of the crime of manslaughter. Affirmed.

George G. Williamson, Williamson & Williamson, and Edward E. Cushman, for appellant.

F. Campbell, Charles O. Bates and Walter M. Har for respondent.

RUDKIN, J.—The defendant below was informed against for the crime of murder in the first degree. The jury returned a verdict of guilty of the crime of manslaughter, and from the judgment and sentence of the court this appeal is taken. The following errors are assigned in the brief of counsel: (1) Error in overruling the motion to dismiss, upon the ground that the court below had no jurisdiction to try the cause, or to pronounce judgment therein; (2) error in refusing a new trial on the ground of misconduct of one of the jurors; (3) error in refusing a new trial on the ground of misconduct of the prosecuting attorney; and (4) error in refusing to give certain instructions requested by the appellant.

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Opinion Per RUDKIN, J.

(1) The first assignment is based upon the ground that the alleged offense was committed by an Indian, against the person of another Indian, within an Indian reservation, and that, under § 9 of the act of Congress of March 3, 1885 [23 Stat. 385], a state court has no jurisdiction of the person of the accused, or of the offense committed. It is conceded that the appellant is a Puyallup Indian of the full blood, that the deceased was a Puyallup Indian of the full blood, and that the offense was committed within the territorial limits of the Puyallup Indian reservation, in Pierce county, of this state. The first question we are called upon to decide is this: Is the appellant an Indian, within the true intent and meaning of the act of Congress above referred to?

To a proper understanding of this question, a brief statement as to the nature of this reservation, and the status of the Indians living thereon, at the time of the homicide, becomes material. In 1883 or 1884 the lands on this reservation were allotted to the Indians in severalty, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, all restrictions against the alienation of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by the same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor customs. They had abandoned their tribal relations, so far as lay within their power, and had assumed the habits and customs of the Whites among whom they dwell. The reservation is divided into school districts and precincts; some, at least, of the Indian children

attend the public schools maintained under the general laws of the state; precinct officers, such as justices of the peace and constables, are elected and perform the duties of their offices, in their respective precincts. The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to.

This, in brief, was the condition of affairs on the reservation at the time of the commission of this offense. Do the Indians residing on this reservation, under such circumstances, come within the purview of the act of Congress above referred to? We think not. This court held, in the case of *State v. Howard*, 33 Wash. 250, 74 Pac. 382, that said act of Congress only applied to Indians maintaining tribal relations; and a further examination of the subject confirms us in this view. In that case the court says:

“We do not believe it was the intention of Congress that an Indian without tribal relations, who resides among the white people of a state, and is amenable to the laws thereof, can go within an Indian reservation in that state and commit a crime against another Indian, and then assert that the courts of his state cannot try him for the crime.”

An Indian without tribal relations, within a reservation, can have no greater rights than an Indian with the same status residing without a reservation. An examination of the entire legislation of Congress in relation to the Indians and the Indian country shows that the general government has dealt with the Indian tribes only, and not with the individual Indian who has severed his tribal relations and assumed the habits and customs of the Whites. It is only in recent years that the criminal laws of the United States

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were extended to the Indian country, so as to include offenses committed by one Indian against the person or property of another Indian of the same tribe. Prior to such extension, the Indian tribes were self-governing communities, regulated their own domestic affairs, maintained order and peace among their own members by the administration of their own laws and customs. *Ex Parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030.

By the act under consideration, only seven felonies were made punishable, when committed by Indians in the Indian country. All minor offenses were left to be dealt with by the Indian tribes, according to their own laws and customs, administered in their own way. It is not to be supposed that Congress intended that the remnant of a band of Indians, like the Puyallups, without tribal relations, without laws or customs, and without a government to administer them, should be left to prey upon each other and upon society at large, without restraint or fear of punishment from any source, unless they should commit one of the felonies enumerated in this act. All the cases to which we are cited, state and federal, deal with tribal Indians only, and we think the act in question must be restricted to these.

(2) The conversation between the juror Chambers and the deputy sheriff had no relation whatever to this case, and constituted no ground for a new trial.

(3) The statement of the prosecuting attorney which forms the basis of this assignment is as follows:

"Have they told us how she came by those bruises? how easy it was for them to do so; have they told us what became of or what was done with her clothes? how easy it was for them to do that; have they told us where she fell out of the wagon? not a word, and yet how easy it was for them to have told us that."

It is claimed that this was a comment on the failure of

the appellant to testify in his own behalf. We do not agree with the prosecuting attorney that he has the right to comment on the failure of a defendant to testify in a criminal case. He has no right to comment on matters which the jury, under the law and the instructions of the court, must not consider. It would be idle for the court to instruct the jury to draw no inference against a defendant by reason of his failure to testify in his own behalf, after permitting the prosecuting attorney to comment upon and discuss such failure. The statute, which imposes upon the court the duty to instruct the jury that no inference arises against the defendant by reason of his failure to testify, by implication, forbids the prosecuting attorney, as an officer of the court, to comment upon such failure.

We do not concede, however, that the prosecuting attorney exceeded his authority in this case. We think his contention that the above remarks were addressed to counsel for the appellant, and to their argument, is a reasonable construction of the language used. Furthermore, the prosecuting attorney has an undoubted right to comment upon the failure of the defense to explain incriminating circumstances appearing in evidence, though those circumstances might be explained, in part at least, by the appellant himself. The prosecuting attorney has the right to comment upon the evidence, or upon the lack of evidence, and it is only when he comments upon the failure of a defendant to testify that he violates any of his rights. This was not done in the case at bar.

No error has been pointed out in the giving or refusing of instructions, and we discover none. There is no error in the record, and the judgment of the court below is affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ., concur.

ROOT and CROW, JJ., took no part.

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Opinion Per Root, J.

[No. 5396. Decided February 18, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWIN J.
BROWN, *Appellant*.¹

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e41	183
d41	184

CONSTITUTIONAL LAW—DENTISTS—LICENSE FOR OWNERSHIP OF DENTAL OFFICE. That portion of Laws, 1891, p. 314, requiring one to submit to an examination and secure a license from the state dental board, in order to "own, run or manage" a dental office, as distinguished from the practice of dentistry, is unconstitutional.

SAME—POLICE POWER. Restricting the right to own, run, or manage a dental office is not a proper exercise of the police power, since technical knowledge or skill is not essential to the proper exercise of such right and is not required for the well being of the public, and the acts in question do not injuriously affect the health, good order, or safety of society.

SAME—RIGHT OF PROPERTY AND LIBERTY. Restricting the right to own, run, or manage a dental office is an unwarranted abridgment of the private right of property and of the citizen's liberty to engage in legitimate pursuits for a livelihood.

APPEAL AND ERROR—BRIEFS. A motion to strike a brief on the ground of an incorrect statement of the case and want of references to the record will be denied where the record is short and reference thereto not essential to the decision.

Appeal from a judgment of the superior court for King county, Kennan, J., entered June 24, 1904, upon a trial and conviction of the offense of owning and running a dental office without a license. Reversed.

John R. Parker, for appellant.

Samuel R. Stern, for respondent.

Root, J.—Appellant was prosecuted upon an information charging him with "the crime of owning, running and managing a dental office or department in the state of Washington, without a license," in violation of an act

¹Reported in 79 Pac. 635.

of the legislature approved March 18, 1901, commonly known as the "dental law," and found at pages 314 to 318, of the published session laws of 1901. The portions of said act involved in this case are as follows:

"§ 4. Any person or persons seeking to practise dentistry in the state of Washington, or to own, operate or cause to be operated, or to run or manage a dental office or place for the practise of dentistry in the state of Washington after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful possession of the same: . . .

"§ 8. Any person who, as principal, agent, employer, employee, or assistant, who in any manner whatsoever shall practise dentistry or who shall own, run, operate or cause to be operated, or manage a dental office or headquarters in the state of Washington without having first filed for record and had recorded in the office of the auditor of the county wherein he shall so practise or do such act, a certificate from said board of dental examiners as herein provided, shall be deemed guilty of a misdemeanor, . . .

"§ 11. All persons shall be said to be practising dentistry within the meaning of this act who shall contrary to this act for a fee or salary or other reward paid either to himself or to another person for operations or parts of operations of any kind, treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof, or who shall own, run, or manage a dental office or department in the state of Washington, without registering and procuring the license as herein provided."

From a judgment of conviction, he appeals to this court.

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Appellant contends that this statute is unconstitutional, and especially that portion requiring a license from the state board of dental examiners as a prerequisite to "owning, running, or managing" a dental office or department. The validity of this statute, in so far as it requires a license from said board before one may "treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof," has been heretofore upheld by this court. *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110. *In re Thompson*, 36 Wash. 377, 78 Pac. 899. These decisions sustain the statutory requirements for the "practice of dentistry," as that expression is commonly understood, and as it is mentioned in section 4 of the act above quoted, where the disjunctive "or" shows it to be clearly distinguished from the expression "to own, operate or cause to be operated, or to run or manage a dental office or place for the practice of dentistry," which follows.

The question is now presented as to the power of the legislature to enact a law requiring an examination by, and license from, the state dental board, as a prerequisite to "owning, running and managing a dental office or department." Appellant contends that this is an unwarrantable infringement of a natural and constitutional right. Respondent maintains that it is justifiable as a legitimate exercise of the police power of the state. It will be conceded, we apprehend, that the portion of the law in question cannot be sustained, unless by virtue of the police power. This requires a consideration of the purpose, nature and extent of that power. Courts and textbook writers have found it difficult to accurately define this power, and we find their conceptions of it expressed in varied forms. This court, in the case of *State v. Carey*, 4 Wash. 424, 30 Pac. 728, speaking through Dunbar, J., quotes approvingly from the case of *Lake View v. Rose*

Hill Cemetery, 70 Ill. 192, 22 Am. Rep. 71, where the court referred to this subject as "that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." Speaking of it in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, Mr. Justice Field, at page 87, said:

"That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society. . . . But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgment."

In *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527, the supreme court of the United States, speaking through Mr. Justice Strong, said: "The state may protect the lives, limbs, health, comfort and quiet of all persons and their property." From these and the many adjudicated cases touching the subject, the proposition is deducible that the police power may curtail the rights of the individual in so far as, and no farther than, the free exercise thereof is calculated to infringe upon the rights of others. Ordinarily a natural and constitutional personal right or privilege may be limited only when its free exercise threatens or endangers the moral or physical well-being of others, or their property; and rights and privileges concerning property may be circumscribed under like circumstances, or when the public, or some portion thereof, has an interest or is concerned in the use thereof. The police power does not justify the withholding from one individual of a natural privilege or right, in order that a corresponding advantage may be added to the rights or privileges of another. The restriction is permissible only as a preventive of evil results reasonably to be expected without such limitation. Russell on Police Power, pp. 34, 35, says:

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"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The foregoing quotation is the language of the supreme court of the United States in *Lawton v. Steele*, 152 U. S. 137, 14 Sup. Ct. 499, 38 L. Ed. 385. See, also, *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. Our constitutions, both federal and state, are jealous of the rights of the individual, and will permit of their abridgment only where the same is essential to the well-being and rights of others. In the case of *State ex rel. Smith v. Board of Dental Examiners*, *supra*, this court, speaking through Hadley, J., said:

"It is of the highest importance to the state that suffering and afflicted humanity shall not be subjected to the care and treatment of unlearned and unskilled persons. In its effort to prevent such a misfortune to its people, the state may adopt a standard for the test of fitness to engage in the work of what should be a learned profession."

The reasoning and conclusion thus set forth, applied as they were to the "practice of dentistry," as commonly understood, are incontrovertible. But are the reasons therein assigned applicable to a statute requiring an examination by, and license from, a dental board before one may "own, run, or manage" a dental office? Does the police power authorize the enactment of a statute making this requirement? We feel constrained to hold that it does not. It is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to "treat diseases or lesions of

the human teeth or of jaws or correct malpositions thereof." To perform such work with safety and proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to "own, run, or manage" a dental office? We think not.

To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist. To illustrate, suppose a man thoroughly qualified and legally licensed as a dentist should die, leaving a perfectly and completely equipped dental office to his widow, who knew nothing of dentistry and was incapable of securing a license. By continuing to "own" this property any appreciable time she would become liable to prosecution, under this part of the statute. Can the police or any other power be constitutionally invoked to produce such a result? We are led to believe not. Let us carry the illustration a little further. The widow, not being able to sell the dental office to advantage, decides to hire competent and legally licensed dentists to treat patrons of the office, and undertakes the management herself, paying bills, collecting accounts, arranging credits, making appointments, and doing other acts necessary to the supervision and control of the business affairs of the concern. Then she becomes a criminal, if this portion of the statute have virtue, because she has "managed a dental office." And yet, it will scarcely be contended that any of these acts injuriously affect "the health, good order, morals, peace, or safety" of society, or menace "the lives, limbs, health, comfort, quiet or property" of the patients treated in such office. Many similar illustrations will readily oc-

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cur to the mind given to the contemplation of the natural results reasonably to be anticipated under the operation of such a statute.

A consideration of the province of the police power, in the light of constitutional rights, would seem to show, beyond controversy, that in the enactment of this portion of the statute the legislature transcended its authority. Should the owner or manager hire operators not legally qualified, or should they participate in the treatment or operations mentioned in the other portion of the statute, they would, of course, be amenable to and punishable under those provisions. But we are unable to say or perceive that the health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required.

In the case of *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, this court held unconstitutional an act of the legislature requiring horseshoers to pass an examination. In the opinion the following language occurs:

“ ‘Liberty,’ in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.”

And the court quotes from the case of *Allgeyer v. Louisiana*, 165 U. S. 589, 17 Sup. Ct. 427, 41 L. Ed. 832, where the supreme court of the United States employed similar language in a like holding. In *People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. 763, the court of appeals of New York held unconstitutional a statute pro-

hibiting a person from selling railroad tickets unless employed by a transportation company. In the opinion Mr. Justice Parker said:

"It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business, because there are wrongdoers in it, . . ."

It was held that the legislature has not the power to interdict the sale of a valid ticket by one person to another upon the pretext that fraud will thus be prevented.

Judge Brannon, in his book, "The Fourteenth Amendment," at page 200, says:

"While guarding the public right and welfare, we must not forget the person's right; we must not submerge the right of the individual in the ocean of public right. . . . All men are free by nature. They have certain inalienable rights, says the Declaration of Independence. When they enter into the body politic they do not give up these rights. . . . They have right of life, right of property, and, with the aid of property as a handmaid, to earn a livelihood in their own ways, not harming others. They have right to labor, right to contract, right to do business. These are rights of liberty inhering and sheltered by the word 'liberty,' expressed in the constitution. Legislation for the high public behest of public safety and welfare can justly detract from those rights, but not otherwise. No call but a necessary public want can do so."

See, also, *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; Tiedeman, *State & Federal Control*, p. 13 *et seq.*, and 482; Tiedeman, *Lim. Police Power*, p. 194 *et seq.*, and 277-281; Cooley, *Torts*, p. 277; *People v. Caldwell*, 168 N. Y. 671, 61 N. E. 1132; *In re Sing Lee*, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. 218; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. 238; Black, *Constitutional Law* (2d ed.), 471 *et seq.*

Congress has enacted statutes requiring masters, mates, and engineers of various vessels to pass examinations and

procure licenses before engaging in the work of their respective avocations. But we are unaware of any such prerequisite for one seeking to own a ship or manage its business. Druggists who compound medicines must have a license, but this is not essential to ownership of a drug store. The owner complies with the statute when he hires a duly licensed pharmacist to attend to the matters requiring a knowledge of drugs, medicines, and poisons. Had the "ownership" of ships or drug stores been deemed a menace to the health, safety, or welfare of those patronizing either, examinations and licenses would doubtless have been provided for. But the necessity for such requirements evidently never occurred either to Congress or the legislature. Yet the reasonableness and legality of such prerequisites could be more readily upheld than those involved in the case at bar. Mr. Tiedeman, in *Limitations of Police Power*, p. 277, says: "But it is a judicial question, whether the particular occupation or trade can, under the constitutional limitations, be restrained." See, also, *State v. Namias*, 49 La. Ann. 618, 21 South. 852, 62 Am. St. 657; 22 Am. & Eng. Ency. Law (2d ed.), 931 *et seq.*; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

We feel that a court should be reluctant to pronounce a statute invalid, except where its plain duty impels such action. Conceiving this to be such a case, we are led to declare that part of the statute requiring an examination and license in order to "own, run, or manage" a dental office or department void.

Appellant contends that the information is insufficient, and alleges numerous errors as to rulings upon the reception, exclusion, and sufficiency of evidence. These matters become immaterial in view of our conclusion as to the validity of the statute.

Respondent moves to strike appellant's brief upon the

ground that it does not contain a correct statement of the case, and does not contain references to the transcript. The brief contains some references, but should have more. However, the record and transcript are short, and our view of the law has rendered it unnecessary to make an extended examination of them. The motion will be denied. *Froelich v. Morse*, 15 Wash. 636, 47 Pac. 22.

The judgment of the honorable superior court is reversed, and the case remanded, with instructions to dismiss the action.

MOUNT, C. J., RUDKIN, DUNBAR, and CROW, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 5397. Decided February 18, 1905.]

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THE STATE OF WASHINGTON, *Respondent*, v. EDWIN J. BROWN, *Appellant*.¹

CONSTITUTIONAL LAW—POLICE POWER—DENTISTRY. The provisions of Laws 1901, pp. 314-318, regulating the practice of dentistry are a valid exercise of the police power.

CRIMINAL LAW—PRACTICING DENTISTRY WITHOUT A LICENSE—INSTRUCTIONS. Upon a prosecution for practicing dentistry without a license it is proper to instruct that it is not necessary to show that a fee was charged for any specific act, or payment made upon performance of the service, or that the act was committed on the exact day charged, but that it is sufficient if it appears that a fee was charged for a series of acts of which the act complained of was one, and that payment was made at any time within one year, for an act performed within one year of the filing of the information.

TRIAL—ASSIGNMENT—DISCRETION OF COURT—REVIEW. The manner of assigning a case on the trial docket is within the discretion of the trial court, and not to be reviewed except for abuse thereof.

¹Reported in 79 Pac. 638.

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Opinion Per Root, J.

CRIMINAL LAW—TRIAL—TIME FOR PLEA. The defendant cannot allege error in that he was not allowed one day to plead, where at the arraignment he answered that he was ready and plead not guilty.

PRACTICING DENTISTRY WITHOUT LICENSE—EVIDENCE OF QUALIFICATIONS—ATTACK ON DECISION OF DENTAL BOARD. Upon a prosecution for practicing dentistry without a license, it is proper to exclude evidence going to show that the defendant properly passed his examination and that the license was withheld through the fraud of the dental board, since the decision of the board cannot be questioned in that manner.

Appeal from a judgment of the superior court for King county, Kennan, J., entered May 13, 1904, upon a trial and conviction of the offense of practicing dentistry without a license. Affirmed.

John R. Parker, for appellant.

Samuel R. Stern, for respondent.

ROOT, J.—Appellant was prosecuted upon an information charging him with “the crime of practicing dentistry without a license,” in that he did “treat a disease and lesion of the human teeth, and did correct malpositions of the human teeth and jaws of one Mrs. Eliza Agutter,” etc., in violation of what is commonly known as the “Dental Law,” as amended by the act of the legislature approved March 18, 1901, and found in the published session laws of 1901, pp. 314-318. He was tried before a jury and convicted, and from the judgment and sentence of the trial court appeals to this court.

Appellant contends that the statute under which this prosecution was brought is unconstitutional. That portion of said statute has been heretofore upheld by this court. *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *In re Thompson*, 36 Wash. 377, 78 Pac. 899.

It is also contended that the evidence introduced by the

state was insufficient to justify a verdict, and that the motion for nonsuit, interposed at the close of the state's case, should have been sustained. While the evidence is meager, yet it was sufficient upon which to submit the case to the jury; and they having returned a verdict of guilty, we think the evidence adequate to sustain it.

The court gave the jury the following instructions:

"It is not necessary to show that a separate fee was charged for any specific act as shown in the testimony and alleged in the information to have taken place, but it is sufficient to show that a fee was charged and collected for a series of acts in violation of any of the provisions of this law, as charged in the information, and that the act complained of was one of the series.

"You are also charged that the payment for services need not be shown to have been made after the services are alleged to have been performed, but it is sufficient to show that, at some time within one year before the filing of the information, a fee was paid for the services alleged to have been rendered.

"That it is not necessary that the state should show that the offense was committed upon the exact date set out in the information, but that it is sufficient to show that the offense was committed at any time within one year prior to the filing of the complaint or information."

To the giving of each of these instructions exception was taken, and such action of the court is urged as error on this appeal. We think these instructions were applicable to the evidence and consistent with the law of the case, and that no prejudicial error resulted to the appellant by reason of the giving thereof.

Appellant complains that his case was not put upon the trial docket of the superior court in the regular manner. This was a matter largely within the discretion of the trial court, and, in the absence of a showing of abuse of discretion, we are not inclined to review that court's action in the premises.

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Opinion Per Root, J.

Appellant complains that he was not allowed one day within which to plead. The transcript of the record, brought here by appellant, shows that, at the time of arraignment, the appellant was asked if he was ready to plead, and answered that he was, and thereupon interposed a plea of "not guilty." In the absence of any fact to the contrary, certified by the trial judge, this record must be controlling.

Appellant also contends that his motion to require the state to produce the questions and answers propounded to appellant at the time of his examination by the board of dental examiners should have been sustained, and that he should have been permitted to show that he successfully passed said examination, and was entitled to a license from said board, and that the same had been wrongfully, dishonestly and fraudulently withheld from him. We do not think the action of the state dental board can be questioned in this manner. In the case of *In re Thompson, supra*, this court, speaking by Mount, J., used this language: "The remedy of petitioner for an abuse of the powers of the dental board is not an attack upon the act creating the board, but must be found in some appropriate proceeding to review the conduct of the board."

Upon the whole record we feel that the case should be affirmed, and it is so ordered.

MOUNT, C. J., RUDKIN, CROW, and DUNBAR, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

37	110
137	694

[No. 5398. Decided February 18, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. C. H.
SEXTON, *Appellant*.¹

CONSTITUTIONAL LAW—POLICE POWER—DENTISTRY. The provisions of Laws 1901, pp. 314-318, regulating the practice of dentistry are a valid exercise of the police power.

TRIAL—NONSUIT—RE-OPENING CASE. It is discretionary to reopen a case for further evidence after the state has rested and a motion for a nonsuit is about to be granted, and error cannot be predicated thereon in the absence of abuse of discretion.

CRIMINAL LAW—PRACTICING DENTISTRY WITHOUT A LICENSE—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of the offense of practicing dentistry without a license where it appears that the defendant cleaned a patient's teeth, removed tartar therefrom, and made an examination for the purpose of estimating the cost of further treatment.

TRIAL—ASSIGNMENT—DISCRETION OF COURT—REVIEW. The manner of assigning a case on the trial docket is within the discretion of the trial court, and not to be reviewed except for abuse thereof.

CRIMINAL LAW—TRIAL—TIME FOR PLEA—WAIVER OF OBJECTION. The defendant cannot allege error in that he was not allowed one day in which to plead, where he waived arraignment and the trial was continued, and no objection was made until after conviction.

CRIMINAL LAW—TRIAL—INDORSEMENT OF NAMES OF WITNESSES. It is largely discretionary to permit a witness to testify without indorsement of his name upon the information, and is not ground for reversal where defendant suffered no disadvantage thereby.

Appeal from a judgment of the superior court for King county, Kennan, J., entered May 13, 1904, upon a trial and conviction of the offense of practicing dentistry without a license. Affirmed.

John R. Parker and E. J. Brown, for appellant.

Samuel R. Stern, for respondent.

¹Reported in 79 Pac. 634.

Feb. 1905]

Opinion Per Roor, J.

Roor, J.—Appellant was prosecuted upon an information charging him with “the crime of practicing dentistry without a license,” in that he did “treat a disease and lesion of the human teeth, and did correct malpositions of the human teeth and jaws, of one R. A. Netzer,” in violation of the provisions of the “Dental Law” (Laws of 1901, pp. 314-318). From a judgment of conviction by the superior court he appeals to this court.

Appellant assails the constitutionality of this act; but that portion of the act involved in this case has been heretofore upheld by this court. See, *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *In re Thompson*, 36 Wash. 377, 78 Pac. 899.

After introducing certain evidence at the trial, the state rested its case; whereupon the appellant moved for a nonsuit. Without ruling upon the motion, the court made a remark intimating that the evidence was insufficient. Thereupon respondent's attorney asked permission to introduce further testimony on the point under consideration. To this, appellant's attorneys objected; but the objection was overruled, and the state proceeded to introduce further testimony. This action of the trial court is alleged as error. We are inclined to think that ordinarily this is a matter within the sound discretion of the trial court, and, in the absence of a showing of an abuse of discretion, should not be reviewed by the appellate court. In the case of *Tucker v. People*, 122 Ill. 583 (p. 594), 13 N. E. 809, the supreme court of Illinois said:

“The admission of further evidence after the case had been closed and before the jury had retired, was a matter resting in the sound discretion of the court, and as it does not appear that the discretion was abused, we do not think the court erred.”

See, *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac.

209; *State v. Buchler*, 103 Mo. 203, 15 S. W. 331; *State v. Flynn*, 42 Iowa, 164; *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460; *Dyer v. State*, 88 Ala. 225, 7 South. 267; *Wiggins v. State*, 80 Ga. 468, 5 S. E. 503; 1 Bishop, New Crim. Pro., p. 582, § 966. We are not persuaded that the trial court abused its discretion in this instance.

Appellant further contends that there was not evidence sufficient to justify the submission of the case to the jury, or to support a verdict of guilty. There was evidence that the appellant cleaned the teeth of Netzer, removing tartar therefrom, and made an examination of them in order to give an estimate of the cost of "having them fixed;" that he "sounded" them and "picked" them. While part of this evidence was contradicted, it was nevertheless sufficient to carry the case to the jury, and, if believed, to justify a verdict of guilty under the provisions of the law in question.

Appellant claims that the case was not regularly set for trial. This is a matter largely within the discretion of the trial court, and not susceptible of review here except where an abuse of discretion is shown, which is not done in this case. It is also claimed that appellant was not given the statutory time of one day to plead. The record shows that he waived arraignment on April 11, 1904, and that the case was on the same day continued "for trial" to April 13, and tried on April 15. No objection to lack of time to plead or to going to trial appears to have been made until after conviction. This was too late.

Appellant further alleges that the court erred in permitting one Dr. Reynolds to testify, inasmuch as his name had not been indorsed on the information prior to the trial. This, also, was a matter largely within the discretion of the trial court, and, from the character of the evidence given by said witness, we cannot see that appellant was

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thereby put to a disadvantage, or that the trial court abused its discretion.

Certain other errors are assigned touching the introduction of evidence, but an examination of these assignments fails to reveal any merit.

The judgment of the lower court is affirmed.

MOUNT, C. J., RUDKIN, CROW, and DUNBAR, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 4920. Decided February 20, 1905.]

JOSEPH P. LAMBERT, *Appellant*, v. LA CONNER TRADING AND TRANSPORTATION COMPANY, *Respondent*.¹

TRIAL—INSTRUCTIONS—STATEMENT OF ISSUES. It is not error that the instructions to the jury were not prefaced by the usual statement of simple issues formed by the pleadings.

CARRIERS—MASTER AND SERVANT—EMPLOYEE WHEN NOT PASSENGER ON BOAT. Where a stevedore employed on board a steamer was injured in a collision with a drawbridge through his master's negligence, he is not a passenger while idle and *en route*, and is entitled only to the degree of care owed to servants, where he lived on board under continuous employment, although his principal work was done while in port.

SEAMEN—ACTION FOR PERSONAL INJURIES—COMPLAINT IN TORT—NO RECOVERY ON MARITIME CONTRACT. In an action by a stevedore on board a boat, for personal injuries, based solely upon the tortious negligence of the master, the plaintiff cannot recover as a seaman upon a maritime contract for time lost and expenses.

MASTER AND SERVANT—NEGLIGENCE OF CAPTAIN OF BOAT—EVIDENCE IN REBUTTAL. Upon an issue in an action for personal injuries as to the negligence of the captain of a boat which collided with a drawbridge, it is proper to exclude evidence in rebuttal to the effect that the captain asked the bridge tender whether the bridge could not be further opened, in time to have enabled him to

¹Reported in 79 Pac. 608.

avoid the accident, as, the captain having testified that he called out, it was not impeaching his evidence and the question of distance was a part of the plaintiff's case in chief.

EVIDENCE—OPINIONS—EXPERTS. In an action for personal injuries sustained through the alleged negligence of the captain of a boat in a collision with a drawbridge, it is proper to allow the captain to state his opinion as to whether he could have avoided the accident, where he has qualified and is testifying as an expert witness.

COSTS—RETAXATION. The costs allowed upon a retaxation before the trial court will not be disturbed on appeal, where the record shows a dispute as to the propriety of the item allowed, supported by an affidavit on each side.

Appeal from a judgment of the superior court for King county, Bell, J., entered May 18, 1903, upon the verdict of a jury rendered in favor of the defendant, after a trial on the merits, dismissing an action for personal injuries sustained in the collision of a steamer with a drawbridge. Affirmed.

A. W. Buddress, for appellant.

Ira Bronson, for respondent.

HADLEY, J.—Appellant brought this action against respondent, and claims damages for injuries received while he was in the employ of the latter. On June 8, 1901, respondent was the owner of a steamer or vessel, called the "E. D. Smith," which it was operating between the cities of Seattle and LaConner. Some time prior to said date, appellant had entered the employ of respondent, as he alleges, in the capacity of a stevedore on board of said vessel. It is alleged that, on the date named, the respondent negligently operated the vessel, and that, by reason thereof, the steamer collided with a certain drawbridge, through which it was attempting to take the vessel; that certain boards were torn loose from the side of the vessel, and

driven against respondent in a sudden and violent manner, whereby he received severe and permanent injuries.

Respondent's answer denies the material allegations of the complaint, and affirmatively avers that the accident happened through the negligence of the bridge tender, who was in control of the drawbridge, in that he failed to keep the bridge properly open; that the accident occurred without negligence on the part of respondent, and despite the efforts of the master and crew, except the appellant; that appellant was not at the time performing the duties for which he was employed; that he was not upon that part of the steamer where he was employed to be, and where he should have been, but was on the outside, merely attempting to see what was being done; that he assumed all the risks and danger of his position, against the wishes of respondent, and in violation of the latter's orders and instructions, expressly given. Contributory negligence is also averred. The cause was tried before the court and a jury, and resulted in a verdict for the defendant. Judgment was entered upon the verdict, dismissing the action, and the plaintiff has appealed.

The cause was once before here on appeal. See, 30 Wash. 346, 70 Pac. 960. A judgment of nonsuit was here reversed, and the cause was returned for submission to a jury.

Appellant assigns that the court erred in not stating to the jury the issues involved in the case. It is true, the instructions were not prefaced by a statement of the issues formed by the pleadings, as is usual in trial courts. It is not necessary, however, that any particular form or routine shall be followed when giving instructions.

"In charging the jury the court shall state to them all matters of law necessary for the information of the jury in finding a verdict; . . ." Bal. Code, § 4993, subd. 6. The issues were simple, and we think, from the instruc-

tions as a whole, the controversy to be tried was made clear to the jury.

It is assigned that the court erred in giving certain instructions, on the ground that they proceed upon an erroneous theory. Appellant insists that he was a passenger upon the steamer at the time of his injury, and that the instructions are based upon the theory that he was an employee, and not a mere passenger. *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586, is cited in support of appellant's contention. In that case the employee was engaged at track laying, and his contract provided for a stipulated compensation and, also, free transportation to and from the place of his work. While being thus transported, he was injured, and it was held that his relations to the company were then the same as those of any other passenger. We think the relations between appellant and respondent were not similar to those between Peterson and his employer. Peterson was not employed to discharge any duties upon the street car. His work was entirely at another place, and he was under no duties, other than those of a passenger, while traveling upon the car. In the case at bar, the appellant alleges in his complaint that he was employed as a "stevedore on board of said vessel." He not only worked upon the vessel, but *lived* upon it from day to day; and, while it may be true that his principal work was discharged when the vessel was in port, yet his employment was continuous, even while the vessel was *en route*, and it involved the handling of freight upon the boat as well as upon shore. Staying with the boat, and traveling with it, was a part of his employment, and for the time thus consumed respondent compensated him. We think the relation of employer and employee existed at the time, and that the criticized instructions were not erroneous for not proceeding upon the theory that appellant was a passenger.

Appellant further contends that, if he was not a passenger, he was a seaman, and that his rights must be adjudged according to the maritime law applicable to seamen. He therefore argues that the instructions were erroneous in that they did not state the rules of the maritime law applicable to such a case. It is urged that, under the maritime law, a seaman is entitled to recover the amount of his expenses and wages for the time lost by reason of his injury, regardless of whether he is guilty of contributory negligence or not, except only gross or willful negligence. Such right of recovery is, however, based upon his contract as a seaman. Without deciding whether this court should apply maritime rules, if such a contract were before us, it is sufficient to say that this is not such a case. The case is based upon tort, and seeks recovery by reason of negligence of the respondent, and upon no other ground. For that reason, if for no other, recovery cannot be had here upon the maritime contract, under the ruling of this court in *Sanders v. Stimson Mill Co.*, 34 Wash. 357, 75 Pac. 974. It is further argued that the instructions were bad upon any theory, but we do not concur in that view. We think they fairly stated the law applicable to the theory upon which the case was brought and tried, and that no prejudicial error appears therein.

It is contended that appellant was not permitted to introduce rebuttal testimony. We think this criticism of the trial court is not well founded. The issues in the case were simple. The appellant charged negligence to respondent, which was denied, and there were affirmative pleas of assumption of the risk and contributory negligence. The facts tending to prove negligence should have been introduced in chief. After the introduction of appellant's evidence upon that subject, respondent introduced its evidence in contradiction thereof. The appellant then sought to introduce certain evidence to the effect that the captain of

the steamer called to the bridge tender to know if he could not open the bridge further, and that this occurred when the steamer was at such a distance from the opening that her course could have been reversed, and the accident thus avoided. It was objected that the testimony was a part of the case in chief, but counsel urged that it was to impeach the captain. We do not think it amounted to impeachment, under the record. The captain had said that he called out, and the question of distance was certainly a matter for evidence in chief. Whether the court would have abused its discretion, if it had disallowed the evidence altogether, on the ground that it belonged to the case in chief, we need not decide, since it did permit the witness to state enough to give to the jury his understanding of the point raised, and appellant's case was thereby not prejudiced.

It is urged that the captain was erroneously permitted to testify as to his conclusion, when he was asked as to his opinion whether he could have prevented the collision after he saw the projection in the bridge. The captain had, however, qualified as an expert seaman, and was then testifying as such. The conclusion drawn was not one of fact, but was an opinion upon a matter requiring skillful knowledge. It went to the jury, not as the statement of a fact, but as the opinion of the witness. As such expert, he was competent to give his opinion. *Bellefontaine etc. R. Co. v. Bailey*, 11 Ohio St. 333; *Fenwick v. Bell*, 47 E. C. L. 311.

Other errors are assigned upon the introduction of testimony, but from a reading of the statement of facts, we find nothing which we believe amounts to reversible error. The evidence shows that appellant stood at the side of the boat, watching the approach to the bridge opening, the movement of the steamer being at the rate of probably one mile per hour, and that, when the collision occurred, he

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was caught and injured. The questions of negligence, contributory negligence, and assumption of the risk were submitted to the jury, and the verdict being against appellant, we find no reason in the record for disturbing it.

A motion to retax costs was filed by appellant, which was in part allowed. The disallowance of the remaining items challenged is assigned as error. The difference between counsel seems in part due to the fact that the cause was assigned for trial on Friday, and was continued until Monday, and that witnesses were in attendance accordingly. The mileage of one witness, who claimed mileage from LaConner, fifty miles or more distant, is also in dispute. The state of the record is such that the correctness of the items is sustained by affidavit upon one side, and is challenged by affidavit upon the other. From the record before us, we are unwilling to say that the trial court, who was in immediate touch with all the facts and circumstances, erred in its ruling upon the motion.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4999. Decided February 20, 1905.]

THE CITY OF SEATTLE, *Appellant*, v. E. M. SMITHERS *et al.*, *Respondents*.¹

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137	221

APPEAL AND ERROR—STATEMENT OF FACTS—REVIEW. A statement of facts is not necessary in an equity case triable *de novo* on appeal, where the only question for review is whether or not the findings support the conclusions of law and the decree.

HIGHWAYS—ADVERSE USE—WAY BY PRESCRIPTION. Where a county road has been generally traveled by residents and the public at large, adversely and continuously for more than twenty years,

¹Reported in 79 Pac. 516.

the use could not have been permissive, and it becomes a public road by prescription, regardless of work thereon at the public expense.

SAME. Bal. Code, § 3846, providing that the public working and use of a road for seven years shall be sufficient to constitute a road by prescription, does not require the expenditure of public work or money where the prescriptive period is co-extensive with the period of limitation for quieting title to land.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 24, 1903, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing on the merits an action to enjoin the obstruction of a county road. Reversed.

Mitchell Gilliam and Hugh A. Tait, for appellant.

Fulton & Faben, for respondents.

MOUNT, C. J.—This action was brought by appellant to perpetually enjoin the respondent from fencing up, and otherwise obstructing, a road known as the “county road,” for the reason that the said road is a public highway, and the obstruction thereof unlawful. The road in question extends in a northerly direction from the north end of Dexter avenue, in the city of Seattle, to and beyond the town of Fremont, across and upon a certain tract of land owned by respondent Smithers, and lying within the corporate limits of the city of Seattle. Appellant bases its contention upon the fact that the road in question is a public highway by prescription and adverse user. Upon the trial on the merits, the lower court made findings of fact, and thereupon entered a decree dismissing the action. This appeal is taken from that decree.

The evidence is not brought here, but the appellant relies solely upon findings, as made by the lower court. Respondents move to dismiss the appeal upon the ground that the case, being an equity case, must be tried here *de novo*,

and that, since the evidence is not brought here, no such trial can be had. This court has held that, "it is not necessary that there should be any statement of facts in order that an appeal should be entertained by this court for the purpose of determining whether or not the conclusions of law and decree were warranted by the findings of fact." *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43. For the purposes of this appeal, both parties are bound by the findings made by the lower court. If these findings do not support the decree, but show that the appellant is entitled to the decree prayed for, the case must be reversed. Otherwise it must be affirmed. The motion must therefore be denied.

The principal findings made by the lower court, and the only ones necessary to be considered upon this appeal, are as follows:

"3. That there is now, and for more than twenty-five years immediately preceding the commencement of this action and ever since the year 1878, has been, a plainly marked and defined and generally traveled road across said Smithers tract of land and leading in a northerly direction from the northerly extension of said Dexter avenue from said city of Seattle to and beyond the town of Fremont, which said road has, during all of said time, and ever since the said year 1878 been generally, habitually and universally traveled by the citizens and residents of said city of Seattle and by the public at large, adversely, continuously, and uninterruptedly, down to the month of February, 1903.

"4. That prior to the year 1890, during which year that certain road or highway known as the Boulevard was completed, said road across said Smithers tract, which was during all of said time, and is now, known and designated as the county road, was the generally, universally and only traveled road between said city of Seattle to and beyond said town of Fremont, and that, ever since the completion of said road or highway known as the Boulevard, said road

across said Smithers tract, known and designated as the county road as aforesaid, has been continuously, adversely and uninterruptedly used by said citizens of Seattle and the general public down to said month of February, 1903.

"5. That during said month of February, 1903, and immediately preceding the commencement of this action, said defendants and each of them obstructed said roadway across said Smithers tract and prevented the same from being used by the citizens of Seattle and the general public by means of fences and ditches erected and excavated across the same, and by means of plowing the same up, and that they threatened and held out, and continue to threaten and hold out, that it is their purpose and intention to obstruct said roadway across said Smithers tract so as to prevent the public or any person or persons whomsoever from using or traveling the same. . . .

"9. That neither said city of Seattle nor the county of King wherein said city is situate has, by its proper officer or officers, or at all, ever done or performed any work or labor upon said roadway, or kept up or maintained the same, and that all work and labor done and performed upon said roadway for the purpose of keeping the same in condition for public travel, has been done by private citizens."

It will be noticed that the court specifically finds that the road in question had been "generally, habitually and universally traveled by the citizens and residents of said city of Seattle and by the public at large, adversely, continuously and uninterruptedly," for a period of twenty-five years. There is no finding to the effect that this use was a permissive use. The finding that the use was adverse, continuous, and uninterrupted necessarily excludes the idea that it was permissive. No authority is called to our attention which holds that the use herein found does not constitute a highway by prescription. On the other hand, authorities are numerous which hold that a road or street which has been used by the general public adversely

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Opinion Per MOUNT, C. J.

for the period of twenty years becomes a public highway by prescription. *Shugarte v. Halliday*, 2 Ill. App. 45; *Commonwealth v. Coupe*, 128 Mass. 63; *Ross v. Thompson*, 78 Ind. 90; *Blumenthal v. State*, 21 Ind. App. 665, 51 N. E. 496; *Howard v. State*, 47 Ark. 431, 2 S. W. 331; *McAllister v. Pickup*, 84 Iowa 65, 50 N. W. 556; *Longworth v. Sedevic*, 165 Mo. 221, 65 S. W. 260.

In *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204, this court said:

"We also reaffirm the doctrine announced in *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858, and fully appreciate the sentiment that the validity of public highways should be recognized by the courts whenever the law has been substantially complied with in the establishment of the same by the proper tribunal, *or whenever the public has been in the unquestioned, adverse, and uninterrupted use of the same for the necessary period of time.*"

See, also, *Megrath v. Nickerson*, 24 Wash. 235, 64 Pac. 163; *Yakima County v. Conrad*, 26 Wash. 155, 66 Pac. 411; *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777.

The lower court was evidently of the opinion that, before a road could become a public highway by prescription, public work or money must have been expended thereon, under the provisions of Bal. Code, § 3846, because a finding was made to the effect that no work has been done on the road at public expense. But this statute does not apply to roads which have been used adversely for a period of time sufficient to constitute a road by prescription without public expense thereon. It applies to cases only where public work and money have been expended. In such cases seven years' user is made sufficient. In other cases the prescriptive period is co-extensive with the period of limitation for quieting title to the lands. *Wasmund v. Harm*, *supra*. The purpose of this statute was evidently to lessen the prescriptive period, when public work and money had

been expended. It does not affect the rule in cases where no public work has been done. This being the effect of the statute, it follows that the findings of the trial court show a public highway by prescription.

The judgment appealed from is therefore reversed, and the cause remanded with directions to the lower court to grant the relief prayed for.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5070. Decided February 20, 1905.]

THE STATE OF WASHINGTON, *on the Relation of B. F. Heuston, Plaintiff*, v. S. A. CALLVERT, *as Commissioner of Public Lands, Defendant*.¹

PUBLIC LANDS—SALES—TIMBER ON STATE LAND—SOLD SEPARATELY—STATUTES—CONSTRUCTION, LAWS 1897, pp. 235, 236, §§ 11 and 12, as amended by LAWS 1903, p. 103 and LAWS 1901, p. 308, requires that the timber on state land shall be sold separately from the land, and that the land shall not be sold, where the timber thereon exceeds one million feet to the quarter section, although that provision of the law is added as an amendment to §12 which relates solely to applications for the sale of timber and other products exclusive of the land, and the sale was applied for under §11, relating to applications for the sale of land without any reference to the timber thereon; since §11 is not an independent act, and must be construed with reference to other parts of the act as now amended, and was impliedly modified by the amendment to section 12.

Application filed in the supreme court February 29, 1904, for a writ of mandamus to compel the commissioner of public lands to sell certain state timber lands to the relator. Writ denied.

B. F. Heuston (*H. S. Griggs*, of counsel), *pro se*.

Reported in 79 Pac. 791.

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Opinion Per MOUNT, C. J.

W. B. Stratton, Attorney General (C. H. Forney, George Dysart and James M. Ashton, of counsel), for defendant.

MOUNT, C. J.—Petition for writ of mandate. Petitioner presented to the commissioner of public lands his application to purchase the northwest quarter of section 16, township 21 north, range 1 east, W. M. The application shows that this land contains 1,200,000 feet of merchantable timber, worth \$1 per 1,000 feet, and that the applicant desires to purchase the land with the timber, and not the timber without the land. When the application to purchase was presented to the commissioner of public lands, he refused to consider it, upon the ground that he was not authorized to sell land and timber when there was more than 1,000,000 feet of timber on a quarter section of land. This writ is sued out to compel the commissioner to sell the land with the timber.

The petitioner contends that the commissioner may sell the land notwithstanding the amount of timber there may be thereon. This raises the only question in the case, and depends upon the construction of sections 11, 12, of the act of 1897, pp. 235, 236, with their subsequent amendments. These sections, as they now stand, are as follows:

“§ 11. That any person or company may make written application to the board of appraisers for the appraisal and sale of any lands belonging to the state, and said board shall cause to be prepared blank applications containing such instructions as will inform and aid intending purchasers in making application for the appraisal and sale of any lands. Each application must be accompanied with certificate of deposit or certified check upon any bank of this state, made payable to the state treasurer and equal in amount to ten cents per acre for the land described in such application: *Provided*, That such deposit may be made in cash or by postoffice money order, but in no case shall such deposit be less than ten dollars. In case the

lands described in such application are sold at the time they are offered for sale, in accordance with such application, the amount of such deposit shall be returned to such applicant. If such lands be not sold, through fault of said applicant at such sale, such deposit shall be forfeited to the state, and shall be so declared by the said board, and the state treasurer shall thereupon place said forfeited money to the credit of the general fund of the state. That when, in the judgment of the board of appraisers or the commissioner of public lands, a sufficient number of applications have been received for the appraisement and sale of any lands belonging to the state, said commissioner of public lands shall cause any of such lands so applied for to be personally inspected and appraised as to its character, topography, agriculture, timber, coal, mineral, stone or rock quarries, or grazing, its distance from any city, town, railroad, river, irrigation ditch or other waterways, when irrigation is required, and fully report the same to said board or commissioner of public lands, together with the commissioner's or appraiser's judgment as to its present and prospective value, which said report shall be considered and thereupon a price per acre fixed for each quarter section and subdivision thereof, or lot or block, which shall not be less than ten dollars per acre for lands granted for educational purposes: *Provided*, That no more than one hundred and sixty acres (160) of any school or granted lands of the state shall be offered for sale in one parcel, and all lands within the limits of any incorporated city or town or within two miles of the boundary of such incorporated city or town, where the valuation of such lands shall be found by appraisement to exceed one hundred dollars per acre, shall, before the same be sold, be platted into lots and blocks of not more than five acres in a block and not more than one block shall be offered for sale in one parcel, and said board is hereby authorized to plat such lands into lots and blocks, and all plats shall be filed in the office of the commissioner of public lands: *Provided further*, That whenever application is made to purchase less than a section, the said commissioner of public lands may order the inspection of an entire section or sections: *Provided*

further, That all school and granted lands for educational purposes may thereafter be sold at not less than the appraised value, when the purchase price realized for the timber thereon added to the appraised value of the land is ten dollars per acre or in excess thereof." Laws 1903, p. 103.

"§ 12. That when applications are made for the purchase of timber, stone, fallen timber, hay, or gravel, or other valuable materials situated upon public lands of the state, the same inspection shall be had as for applications to purchase lands: *Provided*, That no standing timber or stone shall be sold for less than the appraised value thereof, and such timber, stone, hay and gravel may be sold separate from the land, when, in the judgment of the board, it is for the best interest of the state to sell same, except when the estimated amount of timber shall exceed one million feet to the quarter section, in which case the timber shall be sold separate from the land: *And provided further*, That the full purchase price of such valuable materials shall be paid in cash when sold separate from the lands: *Provided*. That in all cases when the timber is sold separate from the land, said timber shall revert to the state if it has not been removed from the land within three years from the date of purchase thereof, except that in all cases when the purchasers are acting in good faith and removing the said timber, the land commissioner may extend the time of removal for a period not to exceed two years. That in every appraisalment of land granted to this state the board of appraisers shall be and serve as the board of appraisers mentioned in section 2 of article 16 of the state constitution. And in every appraisalment under this chapter the said board shall separately appraise all improvements placed upon any land of the state and found on such land at the time of the appraisalment; and shall also appraise all damages and waste done to said land by the cutting and removal of timber or the removal of stone or other materials by the person or persons claiming such improvements, or by his consent, and the damage to the land or materials thereon by reason of the use and occupancy of said land shall be considered in the appraisalment, and the balance, after deducting such

damages and waste appraised as aforesaid, shall be determined as the value of the improvements upon the land so appraised and every such appraisal shall be recorded in the proceedings of the board of appraisers: *Provided*, That this section shall not be considered to affect the right of the state to the value of such land: *Provided further*, That if the purchaser of such land from the state be not the owner of the improvements he shall deposit with the state treasurer, through the board of appraisers, within thirty days after the sale, the appraised value of such improvements; and if it be found by the said board that the owner of said improvements was not holding adversely to the state or improving said land, or that said improvements were placed on said land in good faith by a lessee from the state or territory, or that said lessee had in all respects complied with the terms of his lease and his leasehold interest, not forfeit or subject to a forfeiture, then the board of appraisers shall direct the state treasurer to pay, and he shall pay to the owner of said improvements such sum so deposited; but if it be found by the said board of appraisers that the said improvements owned or made on said land by parties holding or claiming the land, adversely to the state, or by persons without license or lease from the state, or by a lessee who had not complied with the terms of his lease, then said board shall direct the state treasurer to pay over such sum so deposited into the permanent school fund. In case the purchaser shall not deposit the appraised value of the improvements in the manner described above, the sale may be disapproved by the board of appraisers: *Provided further*, That if the said improvements were made by a lessee or other person with intent to defraud the state or the intending purchaser the sum so deposited shall be returned in the manner described above, to the state: *Provided further*, That in determining the value and nature of such improvements the board is hereby authorized to compel by subpoena the attendance, swear and examine witnesses as to the cost and value of such improvements and the damage and waste as well." Laws 1901, p. 308.

It will be seen that section 12 provides that "timber

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. . . may be sold separate from the land, when, in the judgment of the board, it is for the best interest of the state to sell same, *except when the estimated amount of timber shall exceed one million feet to the quarter section, in which case the timber shall be sold separate from the land.*" This language clearly means that the timber and land cannot be sold when the amount of timber shall exceed 1,000,000 feet to the quarter section. Counsel for petitioner argues that section 11 relates solely to the sale of land, with everything contained therein, while section 12 relates to the sale of timber and other land products, exclusive of the land, and that the application in this case to purchase the land was made under section 11, and must be governed by that section alone. Conceding that section 11 relates solely to the sale of the land, in our opinion it does not have the effect of an independent act, but must be construed with reference to other sections of the same act. When the two sections, 11 and 12, are read together, it is apparent that the legislature intended that, when the amount of timber on a quarter section of land exceeds 1,000,000 feet, the land and timber should not be sold together, but the timber alone should be sold. It is true that section 12 of the act of 1897 did not contain the clause "except when the estimated amount of timber shall exceed one million feet to the quarter section, in which case the timber shall be sold separate from the land." This clause was inserted by amendment in 1901. Laws 1901, p. 308. But this amendment necessarily had the effect impliedly to modify section 11, so that lands containing more than 1,000,000 feet of timber could not be sold with the timber thereon. Sutherland, Stat. Constr., § 135; *Swartwout v. Michigan etc. R. Co.*, 24 Mich. 389; *Lawrence v. Grambling*, 13 S. C. 120. Section 11 was subsequently amended in 1903. Laws 1903, p. 103. But the amendments then

made do not, in our opinion, affect the provisions of section 12, above discussed. The two sections, as now amended, must stand together as parts of the same act, and be construed as if originally enacted, and according to the intent of the legislature as manifested by the language used. When so construed, we think it is clear that the commissioner of public lands has no authority to sell the quarter section of land in question, because it contains more than 1,000,000 feet of timber.

The writ prayed for is therefore denied.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5474. Decided February 20, 1905.]

HERMAN HELBIG, *Respondent*, v. GRAYS HARBOR
ELECTRIC COMPANY, *Appellant*.¹

PLEADINGS—COMPLAINT FOR PERSONAL INJURIES—CERTAINTY—AMENDMENT—APPEAL AND ERROR—PREJUDICE. The denial of a motion to make a complaint for personal injuries more definite and certain as to an allegation that plaintiff was "otherwise greatly bruised and injured" is not prejudicial error where no evidence was given of injuries other than those particularly described in the complaint and in a trial amendment thereof.

PLEADINGS—AMENDMENT TO CONFORM TO THE PROOF—SURPRISE—WAIVER OF ERROR. Error cannot be predicated on the allowance of a trial amendment to the complaint to conform to the proof, in the absence of any claim of surprise or motion for a continuance in the court below.

DAMAGES—PERSONAL INJURIES—PHYSICAL EXAMINATION OF PLAINTIFF. Where the plaintiff in an action for personal injuries was examined before the trial at the instance of the defendant, and a trial amendment was allowed showing further injuries, whereupon two physicians were appointed to make a further physical examination, only one of whom attended and testified, it

¹Reported in 79 Pac. 612.

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is not an abuse of discretion to refuse to permit any further examination of the person of the plaintiff except such as could be had in the presence of the jury.

NEGLIGENCE—DEFECT IN STREET—CONTRIBUTORY NEGLIGENCE IN RIDING HORSE WITHOUT BRIDLE. It is not as a matter of law such contributory negligence to ride a gentle horse without saddle or bridle as will preclude a recovery for personal injuries sustained in a fall through the horse's shying at a defect in the street.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 18, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a fall from a horse caused by a defect in the street. Affirmed.

J. B. Bridges, for appellant.

W. H. Abel and *Ben Sheeks*, for respondent.

RUDKIN, J.—On and prior to the 19th day of September, 1903, the defendant, the Grays Harbor Electric Company, was engaged in the construction of a street railway in the city of Aberdeen. Heron street of said city, along which such street railway was under construction, was planked throughout its entire length, and it became necessary to cut out and remove a portion of the planking, for the purpose of driving piles and laying the rails. This planking was cut out for a width of about seven feet, at the intersection of Heron and Washington streets, and, after the rails were laid, a temporary crossing was constructed where the planking had been removed. There is a conflict in the testimony as to the nature of this temporary crossing. The plaintiff was riding his horse over this temporary crossing, and, according to his testimony and the testimony of his witnesses, a loose board or plank flew up from the crossing, and caused the horse to shy, throwing the plaintiff to the ground, and thereby causing the injuries complained of. A verdict was returned for the

plaintiff, and from the judgment entered thereon this appeal is taken.

(1) The first error assigned relates to the denial by the court of a motion to make the complaint more definite and certain. The injuries suffered by the respondent were thus described in his original complaint: "Plaintiff's collar bone was broken, and he was otherwise thereby greatly bruised and injured, and caused much pain and suffering, to his damage, etc." Inasmuch as no proof was offered as to any injury suffered by the respondent, except as to the broken collar bone and the other injury specifically described in the amendment allowed by the court, as hereafter stated, the appellant was not prejudiced by the denial of the motion to make the complaint more definite and certain in relation to the injuries received, and we are not called upon to decide whether the other general allegations were sufficiently specific to entitle the respondent to prove other injuries, not particularly described in his complaint or in the amendment.

(2) On the examination of one of the expert witnesses produced by the respondent, it appeared that some other bone, aside from the collar bone, was, or might have been, fractured. After the testimony of this witness was in, the appellant moved the court to strike all testimony relating to the fracture of any bone except the collar bone, as no other fracture was alleged in the complaint. Thereupon the court, on motion of the respondent, allowed an amendment to the complaint during the trial, for the purpose of including the additional injury testified to by this witness. The allowance of this amendment is also assigned as error. The allowance of the amendment was in the discretion of the trial court, and, if the respondent was taken by surprise, it should have applied for a continuance for a reasonable time, to enable it to meet this new

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phase of the case. Having failed to do so, it is in no position to claim surprise, by reason of the allowance of the amendment, in this court.

(3) The respondent was examined by physicians some time prior to the trial, at the instance of the appellant. After the amendment of the complaint, as herein stated, the court, on the application of the appellant, designated two physicians to again examine the respondent. One of these physicians attended and testified on behalf of the respondent; the other was too busily engaged to appear in court. Thereupon a third physician was called, and the court offered to allow this witness to examine the respondent in the presence of the jury, but not otherwise. After what had theretofore transpired, we do not think there was any abuse of discretion, on the part of the trial court, in refusing to permit a further examination of the person of the respondent.

(4) The questions of negligence on the part of the appellant, and of contributory negligence and assumption of risk on the part of respondent, were submitted to the jury under instructions very favorable to the appellant. There was sufficient testimony to establish negligence on the part of the appellant, as alleged in the complaint, and it cannot be said, as a matter of law, that a man who rides a gentle horse with a halter, only, and without saddle or bridle, is guilty of such contributory negligence as will preclude a recovery for injuries caused by a defect in a public street.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 4978. Decided February 21, 1905.]

J. W. RIDGWAY *et al.*, Respondents, v. J. R. DAVENPORT *et al.*, Appellants.¹

INTEREST—USURY—DEDUCTIONS FOR COMMISSION—PRINCIPAL AND AGENT. Under Bal. Code, §§ 3669, 3671, prohibiting interest in excess of twelve per cent, either directly or indirectly, and providing that the principal shall be held for the acts of any person contracting therefor, a note is usurious where brokers loaned the money of the principal and deducted a sum by way of commissions in excess of the legal interest; and the fact that the principal did not authorize such acts or derive any benefit from the commissions is immaterial.

Appeal from a judgment of the superior court for King county, Rudkin, J., entered November 11, 1903, in favor of the plaintiffs, after a trial before the court without a jury, decreeing the satisfaction and cancellation of a chattel mortgage. Affirmed.

Roberts and Leehey, for appellants.

T. D. Page (Jerold Landon Finch, of counsel), for respondents.

DUNBAR, J.—Davenport & Hall are engaged in the real estate, money loaning, insurance, and brokerage business in the city of Seattle. Lee Davenport is a member of this firm. J. R. Davenport is a resident of Butte, Montana, and a brother of Lee Davenport. Davenport & Hall loaned money for J. R. Davenport, under general power of attorney, keeping his money in a bank in Seattle in their name. The respondent Ridgway, desiring to borrow \$150 on chattel security, went to Davenport & Hall, who finally agreed to give him \$125 on the security. They added to this \$125, \$3.75 for interest, and made the note for

¹Reported in 79 Pac. 606.

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\$147.50 in favor of J. R. Davenport, retaining \$18.55 over, and above the added interest of \$3.75. Of this amount, fifty cents was paid for acknowledgment and twenty-five cents for filing the mortgage. One Brownie either introduced or referred—it is not certain which—the respondent to the firm of Davenport & Hall, and it is claimed that he received \$7.50 out of the said \$18.55. Ridgway afterwards paid on the loan \$131, and deposited in court the additional amount necessary to pay the note and the accrued interest at twelve per cent. The twelve per cent interest was expressed in the note, however, on the \$147.50, the face of the note. He then pleaded usury, and refused to pay the balance claimed. The court held the loan usurious as to Davenport. Ridgway testifies positively that there was no talk of commission in the case when he borrowed the money. There is testimony on the other side that the \$18 and odd cents was reserved as commission by the brokers, and that J. R. Davenport got no benefit of that.

It becomes necessary, in passing upon this question, to refer to the statute which governs the case. Section 3669, Bal. Code, (re-enacted in Laws 1899, p. 128) is as follows:

“Any rate of interest not exceeding twelve per centum per annum agreed to in writing by the parties to the contract shall be legal, and no person shall directly or indirectly take or receive in money, goods, or thing in action or in any other way any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve per centum per annum.”

“§ 3671. If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for

the principal less, twice the amount of interest paid, and less the amount of all accrued and unpaid interest; and the acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is illegal interest contracted for by the transaction of any agent, the principal shall be held thereby to the same extent as though he had acted in person. And where the same person acts as agent for the borrower and lender, he shall be deemed the agent of the lender for the purposes of this chapter."

It is contended by the appellants that Lee Davenport was not the agent of J. R. Davenport, and that, if it be admitted that he was the agent of the lender, the lender cannot be bound by some wrongful act of his agent not within the scope of his authority, and which he did not authorize; and many cases are cited sustaining this proposition. But the citation of cases under the ordinary usury statute does not assist the court in construing the statute in this case, and we have been unable to find any other statute which is as sweeping in its terms, and as determined to prevent the usury law from being rendered ineffective by schemes and devices which money lenders frequently resort to. In fact, the statute is so plain that it seems that it is not susceptible of construction. The contention that the lender is not bound by the wrongful act of his agent not within the scope of his authority is right in the face of the statute, which provides that, in all cases where there is illegal interest contracted for by the transaction of any agent, the principal shall be held thereby to the same extent as though he had acted in person. The statute provides, in so many words, that no person shall directly or indirectly take or receive any money, goods, or thing in action, or in any other way, any greater interest, sum or value for the loan or the forbearance of any money, goods or thing in action, than twelve per cent per annum. In this case it is evident that there was taken and received in money a greater interest

than twelve per cent, the sum received amounting to about six per cent per month on the money advanced to the respondent. The indirect taking, then, in this case cannot be disputed, and, under the further provision of the statute that the principal shall be held to the same extent as though he had acted in person, there is no escape from the conclusion that the contract was usurious as to the appellant J. R. Davenport.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5422. Decided February 21, 1905.]

ROBERTSON MORTGAGE COMPANY, *Appellant*, v. SEATTLE,
RENTON & SOUTHERN RAILWAY COMPANY,
Respondent.¹

ESTOPPEL—STREET RAILWAYS—RIGHT OF WAY—ACQUIESCENCE.
Where the owner of platted land agrees in writing to give a right of way across the same for a street railway in consideration of the benefits to be derived therefrom, the railway to be completed in one year on a line acceptable to him, and thereafter acquiesced in the construction of the railway and its use for seven years, he is estopped from asserting that he did not agree to the exact location, or from in any way questioning the right to use the same.

Appeal from a judgment of the superior court for King county, Bell, J., entered March 29, 1904, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to compel payment for, or the vacation of, a railway right of way. Affirmed.

G. W. Saulsberry, for appellant.

Peters & Powell, for respondent.

¹Reported in 79 Pac. 610.

Crow, J.—This is an action in equity, instituted by appellant, the Robertson Mortgage Company, a corporation, for the purpose of requiring the respondent, the Seattle, Renton & Southern Railway Company, a corporation, to condemn and pay for a strip of land occupied and used by it as a right of way, or to vacate the same in the event of its failure to condemn. Judgment of dismissal was entered, and this appeal is prosecuted.

The findings of fact made by the trial court fully state the cause, being in substance as follows:

“(1) That in the year of 1890 the plaintiff corporation was organized under the laws of the state of Washington by one W. B. Robertson and his son, and the said W. B. Robertson then and ever since has owned all the stock of said company, and controlled exclusively the selection of its trustees and officers and management of its property.

“(2) That at all the times hereinafter named the Seattle and Renton Railway Company was a corporation, organized under the laws of the state of Washington for constructing and operating railways, and the defendant, Seattle, Renton and Southern Railway Company, was thereafter organized under the laws of the state of Washington as a corporation with power to construct and operate railways, and before the commencement of this suit had acquired all the property rights and franchises of the Seattle and Renton Railway Company.

“(3) That on the 24th day of March, 1896, the defendant William B. Robertson was the owner of a large tract of land in King county, Washington, bordering on the shores of Lake Washington, and lying between Rainier Beach and the town of Renton, and about two and one-half miles from the former place measured along the lake shore, which said tract was known and platted as ‘Bryn Mawr,’ which plat was recorded in the auditor’s office of King county, Washington, April 14th, 1890, the title to a portion of it standing in the name of the Robertson Mortgage Company, and the title to the balance of it standing in the name of W. B. Robertson, and the said Robertson individ-

ually, or through the Robertson Mortgage Company, has ever since been the owner of the following described portion of Bryn Mawr Park, to wit: Amongst others, blocks six, sixteen, eighteen, twenty-seven, twenty-eight, thirty-seven and thirty-eight, and that tract designated as 'Park' on the plat.

"(4) In the month of March, 1896, the Seattle and Renton Railway Company, being then the owner and operating an electric freight and passenger railway from the heart of the city of Seattle southerly to Rainier Beach, contemplated the extension of said railway line southerly from Rainier Beach to and across Bryn Mawr Park to the town of Renton, and then received from the said William B. Robertson an agreement in writing signed by him, dated March 24th, 1896, agreeing to give said railway company, its successors and assigns a right of way through said Bryn Mawr Park of fifteen (15) feet in width on either side of the center line of its track, to hold for so long as the same should be used for railway purposes; the location thereof to be subject to the approval of said Robertson, conditioned upon said road being constructed within one year; said agreement reciting as a condition the benefits to be derived by the said Robertson by the construction of said railroad.

"(5) Relying on this offer of right of way, the said railway company, between this date and about the middle of August, 1896, surveyed a line of road over and across said Bryn Mawr, and bought material and obtained other rights of way for the road from Rainier Beach to Renton, and perfected all its financial and other arrangements for the construction of the road from Rainier Beach to Renton across and over the above named tract; none of which it would have done but for the agreement of said Robertson and Robertson Mortgage Company to give it said right of way across these lands by reason of the fact that all other persons along the line of road interested therein were giving rights of way and subsidies, and by reason of the further fact that the business to be received by such a road did not justify its building except as an entire line to connect with the town of Renton, and the only feasible course

between its existing terminus at Rainier Beach and the town of Renton by reason of adverse grades back from the water front was through the lands at Bryn Mawr, substantially upon the line surveyed and afterwards built upon by the said company. That on several occasions during this time the said Robertson had gone upon the ground and had assented to the location of the line upon which the road was afterwards constructed and has since existed, and then only refused to give a formal deed conveying the right of way for the reason, as he stated, that there were certain equities outstanding in the property which made it unadvisable for him to make a formal deed.

"(6) That the said railway company actually constructed its road as the same is now located over and across the lands named in the plaintiff's complaint, . . . The said road was completed and in operation in the month of November, 1896, and has been in constant operation as a freight and passenger road ever since.

"(7) That in or about the month of January, 1903, the Robertson Mortgage Company agreed to sell the lands in dispute herein, as well as a large part of said Bryn Mawr Park, to certain individuals for stated installment payments, who in or about the month of September, 1903, demanded of the Seattle, Renton and Southern Railway Company payment for the right of way occupied by its road over said lands; and with this exception there has been no objection or claim on the part of any person against said railway company for the portion of said lands so occupied, or the value thereof, until two days prior to the commencement of this suit, although the said Robertson was at all times from March the 24th, 1896, a resident of the city of Seattle and well knew said road was being operated over and across said lands.

"(8) That said Bryn Mawr Park is located five or six miles south of the city of Seattle, and without access of any kind to said city or to any other populous neighborhood except by a county road not less than half a mile distant from said lands on the west, and connected by old wood roads in poor repair, and by boat service on Lake Washington, except the access now furnished by said rail-

road, and the construction of said railroad has been of great benefit to said tract of land and enhanced the value thereof at least fourfold."

Exceptions having been taken to the findings of fact, appellant contends that they are not supported by the evidence. We have carefully examined all the evidence and are satisfied that it clearly sustains the findings made by the court. The only question, therefore, for this court to determine is, whether the final judgment entered by the trial court was correct and warranted by the facts as found.

Appellant contends that, at most, respondent has been holding possession of the right of way merely under a verbal license, which may be revoked by appellant at its pleasure, citing *Hathaway v. Yakima Water, Light, etc. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 874. With this contention we cannot agree. On March 24, 1896, before respondent extended its line of road, incurred any additional expense, or secured additional right of way, William B. Robertson, who then owned all the capital stock of appellant and controlled the appellant corporation, delivered to F. H. Osgood, manager of respondent, the following written instrument:

"Dear Sir: In consideration of the benefits to accrue to me by the building of an electric railway from Seattle to Renton, I agree to give you the use of a right of way for said railway over all the lands owned or controlled by me in what is known as Bryn Mawr Park, said right of way to be of a width of fifteen feet on each side of the center line of said railroad, the location of the same through said Bryn Mawr Park to be subject to my approval and acceptance, and said road to be in construction and operation within one year from date hereof; provided that whenever said right of way shall cease to be used for electric railway purposes, all uses or benefits hereby given shall then terminate. Yours truly, Wm. B. Robertson.

"Witness, C. M. Anderson."

After the execution and delivery of this instrument, respondent accepted the same and, relying upon its terms, proceeded to procure additional right of way for its line, incurred a large amount of additional expense and outlay, entered upon lands of appellant, and constructed and operated its line thereon with appellant's consent. Respondent now contends appellant is, and should be, estopped from interfering with its possession and use of said right of way. We think the contention of respondent should be sustained.

There is some conflict of evidence as to whether appellant actually agreed or assented to the exact line of the right of way as now occupied by respondent. The trial court, however, in its findings concluded that such agreement or assent had been made, and with this finding we are satisfied. It being true, therefore, that appellant has consented to the right of way now occupied by respondent, and respondent having accepted appellant's written agreement above set forth, and having entered into the possession of said right of way, after the execution of said agreement, with the consent and acquiescence of appellant, and appellant having failed to question such use or occupation for a period of more than seven years, appellant surely should be, and is now, estopped from questioning such use or occupation of said right of way, or from disturbing respondent's possession thereof.

There being no error, the judgment of the lower court is affirmed.

MOUNT, C. J., RUDKIN, ROOT, and DUNBAP JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

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Syllabus.

[No. 4885. Decided February 21, 1905.]

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37 232EVERETT WATER COMPANY, *Respondent*, v. R. W. POWERS
et al., *Appellants*.¹

WATERS—DIVERSION OF—RIGHT OF WAY—DEED—GRANT—LICENSE. An instrument executed as a deed purporting to grant and convey a right of way for a water pipe line, and also the right to divert the flow of water in a certain creek, operates as a grant as in the case of land itself, and is not a license, terminable at will.

SAME—DEED—CERTAINTY—TIME LIMIT FOR DIVERSION. Such a deed is not void for uncertainty in that it fails to fix any time limitation for the diversion of the water, but will be construed as unlimited as to time.

SAME—CERTAINTY AS TO LOCATION. Such a deed is not void for uncertainty in failing to locate the right of way, where entry on the tracts described was made, and a route selected and marked out, and work commenced with the intention of using the strip.

SAME—CERTAINTY AS TO AMOUNT OF WATER. Such a deed is not void for uncertainty as to the amount of water to be diverted where the grant covers all the water except an express reservation for all that one family may need for domestic purposes on a certain forty-acre tract, and in case of fire to the extent of service through a three-inch pipe.

SAME—CERTAINTY AS TO RESERVATIONS OF WATER. Such a deed is not void for uncertainty as to how the reserved water was to be taken, since no pipe being specified except for fire, it follows that water for domestic purposes was to be taken from the bed of the stream.

SAME—CERTAINTY AS TO WIDTH OF RIGHT OF WAY. Such a deed is not void for uncertainty in failing to specify the width of the right of way, since in such case the width would be only such as shall be reasonably necessary.

SAME—DEED NOT AFFECTED BY RIGHTS OF LOWER RIPARIAN OWNERS. A deed of the right to divert the waters of a stream cannot be objected to by successors in interest of the grantor because of the fact that the rights of lower riparian owners had not been acquired.

¹Reported in 79 Pac. 617.

SAME—FRAUD IN PROCURING DEED—PURPOSES FOR WHICH WATER IS TO BE USED. A deed of the right to divert water from a stream for "water purposes at the town of L," is not void for fraud in that it was intended to use the same for a new city to be founded in the vicinity, the name of which was not then determined, where it appears that such intention was made known to the grantor, that the vicinity was known as L, then the nearest postoffice, and water is to be supplied to what is still called L.

SAME—SPECIFYING PURPOSE—SURPLUS. Where a deed grants all the water of a stream, except certain reservations, specifying that the diversion was for "water purposes at the town of L," without any words of prohibition against the use of water for other purposes, the grantee is entitled to use the surplus water, after supplying the town of L, for supplying another city.

SAME—ABANDONMENT OF RIGHT OF WATER—NON-USER—PRIOR LEASE—LIMITATION OF ACTIONS—WHEN COMMENCES TO RUN. Where the owner of the fee grants a right of way for a pipe line across lands subject to a prior lease, and the lessee enjoins any use thereof, the statute of limitations against the grantee upon a non-user of the right of way does not begin to run until the expiration of the lease, and, where only six years had elapsed since that time, the right to use the right of way was not abandoned or lost by non-user; since no non-user for any length of time short of the period of the statute of limitations would constitute an abandonment, when no time is fixed.

SAME—DIVERSION OF WATER—INJUNCTION TO RESTRAIN INTERFERENCE. Injunction is the proper remedy to restrain interference with the right to divert the waters of a stream and to use a pipe line right of way, granted to the plaintiff by the predecessors in interest of the defendants, who deny the plaintiff's right and threaten interference with the enjoyment thereof.

SAME—INJUNCTION PENDING CONDEMNATION PROCEEDINGS. In an action to enjoin a land owner from interfering with a water company's use of a right of way for a pipe line to supply the inhabitants of a city with water, where it appears that a portion of the route departs from the company's granted right of way, it is proper to grant an injunction as to such new part of the route for thirty days to enable the company to institute condemnation proceedings, and to make the same permanent if the proceedings are diligently prosecuted.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered January 17, 1903,

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upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enjoin interference with plaintiff's diversion of the waters of a stream. Affirmed.

G. S. Judd and W. W. Block, for appellants.

Brownell & Coleman and Francis H. Brownell, for respondent.

HADLEY, J.—This suit involves a right of way for a water pipe line, over which the respondent company desires to convey water for the use of the inhabitants of the city of Everett, and, also, the right to divert water for that purpose. The issues and history leading up to the controversy, substantially stated, are as follows: The complaint avers that, in the year 1891, Henry Hewitt, in behalf of a syndicate of New York capitalists, conceived the plan of establishing a townsite at and near the mouth of the Snohomish river; that in furtherance of the project, in the spring of said year, he purchased five thousand or more acres of land in that vicinity; that the nearest post-office in the vicinity of the land was Lowell, an unincorporated village, containing at that time approximately one hundred inhabitants; that, among the plans for developing the proposed town, was that of furnishing a water supply, and constructing a water system therefor; that, in looking over the sources of available water supply, said Hewitt deemed it most practicable to utilize the waters of Woods creek, a stream in the vicinity; that, for the purpose of acquiring the waters of said creek, said Hewitt purchased from S. O. Woods certain lands, over which said stream flows and, also, the right to construct the necessary pipe lines, and to divert the waters of the stream for use in said proposed town, which was then generally known as "Lowell;" that said Woods was then the owner in fee

simple of said land, so purchased, and that the same was unincumbered, except by a lease to one Crook; that said purchase was evidenced by a deed, which was duly recorded on May 22, 1891; that thereafter, in the year 1891, said Hewitt proceeded to mark out the right of way for a pipe line, and to construct the necessary dams, ditches, flumes, and other apparatus, for the purpose of diverting said waters, and utilizing them in such water system for the proposed town; that such diversion was at that time enjoined by decree, entered in an action brought by said Crook against said Hewitt, such injunction being based upon the rights of Crook, as lessee aforesaid, the lease antedating the conveyance to Hewitt, and not expiring until the year 1896; that thereupon Hewitt, being thus compelled to cease operations in the matter of procuring said water supply from Woods creek, sought other sources of supply, and proceeded with the construction of a water system to supply the proposed city, which system is now, and for years has been, owned and operated by respondent; that the proposed townsite was eventually platted under the name of the "City of Everett," and that, at the time of bringing this suit, the same was a municipal corporation, containing approximately 18,000 inhabitants; that the aforesaid rights, obtained by said Hewitt from Woods, were by him duly conveyed to, and are now owned by, respondent, a corporation, which has for years been engaged in furnishing the inhabitants of said city and its vicinity with water for general municipal, manufacturing, and domestic purposes; that for years respondent has utilized for its water system other sources of supply than the said Woods creek, but has always retained its rights in said stream with the intention of eventually utilizing it as a source of supply; that it has, from time to time, acquired the rights of riparian proprietors along the stream, below

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the intended point of diversion in the tract acquired from Woods; that the growth of the city has been so rapid in the last few years as now makes it necessary to utilize the waters of Woods creek, in addition to other sources of supply, in order to furnish the inhabitants of said city and vicinity with water; that about the 1st of August, 1902, respondent started to complete the works necessary to divert the waters of Woods creek into its general system, but was met by claims of appellants, who assert that, from sources of title with which respondent is unacquainted, they are in possession and control of a portion of the lands purchased by Hewitt from Woods, as aforesaid; that appellants have forbidden respondent to go upon or across said land for the purpose of completing the necessary works to divert the waters, they claiming that respondent has no right thereto, and that they threaten by force to prevent the construction of the pipe line across the land. An emergency is alleged, and an injunction asked to restrain appellants from in any way interfering with the construction of said works and the diversion of said waters.

Appellants answered the complaint, alleging that they are the owners of eighty acres over which said Woods creek flows, and that the diversion of the waters at the place proposed would greatly damage them; that, during the year 1891, said Hewitt went upon the land now owned by appellants, and marked out a right of way and constructed a ditch through the land for the purpose of diverting the waters of said stream, claiming to do so under and by virtue of the conveyance from Woods, heretofore mentioned; that, shortly thereafter, said Hewitt abandoned said right of way and ditch, and proceeded to construct water works at a point about five miles distant from the Woods creek location, and that such works have ever since been used to supply water to the city of Everett; that, since March,

1892, no attempt has been made to divert and use the waters of Woods creek, until about August 1, 1902, when respondent, claiming as the assignee of the rights of Hewitt, attempted to lay out a new pipe line, which was separate and distinct from the line originally laid out by Hewitt, running through the land on a different route; that when the aforesaid instrument between Woods and Hewitt was executed, it was the intention of the parties that only sufficient water should be diverted from Woods creek to supply the town of Lowell, which then contained about one hundred inhabitants, is now a place of about five hundred people, and is entirely separate and distinct from the city of Everett; that the principal purpose of respondent, in constructing the pipe line across appellant's lands, and in diverting the water of said stream, is to supply the city of Everett with water; that if only such a quantity of water were diverted as would be necessary to supply the town of Lowell, it would not materially damage appellants, but that the diversion to supply the city of Everett will materially damage them, and will render said stream valueless to them; that, at the time this action was commenced, respondent had not acquired the riparian rights below appellants' lands, and that it has no right to divert the waters at any point along or above their lands; that the instrument between Woods and Hewitt is void and of no effect, for the reason that it is indefinite in its description of the right of way, as to its width and location, and as to the amount of water to be diverted; that respondent seeks to perpetrate a fraud upon appellants, in that it is pretending to proceed by virtue of the original conveyance from Woods to Hewitt, which authorized the diversion of water for the use of the town of Lowell, whereas the principal purpose now is to divert water for the use of the city of Everett; that respondent has never acquired any

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right to construct a pipe line at said place, or to divert the water by means thereof, for the purpose of supplying the city of Everett; that appellants and their grantors have been in possession of said land under color of title, and have been in the open, notorious, and exclusive possession thereof ever since the 1st day of January, 1892; that neither said Hewitt nor his assignee has ever, since said time, attempted to exercise possession or ownership over said lands or waters, and that, inasmuch as more than ten years have elapsed, the respondent is barred. The more material averments of the answer are denied by the reply.

Under issues, the principal features of which are stated above, the cause was tried by the court without a jury, and resulted in a decree permanently enjoining appellants from interfering with respondent in the construction of the pipe line upon appellants' lands, in so far as the same conforms in its route with the one located by Mr. Hewitt in 1891; and, as to that portion of the line now proposed to be constructed which departs from the original location, appellants are enjoined from interfering for a period of thirty days. The decree further provides that, in the event respondent shall, within said period of thirty days, commence condemnation proceedings for that portion of the right of way which departs from the original, then the injunction shall remain in force pending such proceedings, provided they shall be prosecuted with reasonable diligence. From that decree this appeal was taken.

Without enumerating or discussing in detail the various assignments of error set forth in the brief, we will endeavor to discuss by classification the material principles involved in the case. It is contended that the deed from Woods to Hewitt was not a grant, but was a mere license, terminable at will. The instrument contained all the formalities of a deed; it contained the usual phraseology of a

deed, and was duly acknowledged and recorded as such. No time limit was specified in it, and nothing was said therein as to its being revocable by Woods or his assigns. The instrument recites that the grantors "grant, bargain, sell, convey, and confirm unto the said party of the second part and to his heirs and assigns, a right of way . . . for a water pipe line over, upon and across the following described lands . . . and also the right to divert the flow of water running through Woods creek . . . To have and to hold . . . unto said party of the second part and to his heirs and assigns forever."

In *McCue v. Bellingham Bay Water Co.*, 5 Wash. 156, 31 Pac. 461, this court held that a deed for a right of way similar to this was a grant. In *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, it was recognized that the right to the use of the water flowing over land is identified with the realty, and may be the subject of sale or lease, like the land itself. See, also, 1 Warvelle, Vendors (1st ed.), § 15, p. 19 *et seq.*; Gould, Waters (3d ed.), § 304. Thus such subject matter as that of the Woods deed, both as to the right of way and diversion of the water, may be granted, as in the case of land itself. The form, execution, and subject matter of the deed being sufficiently comprehensive for a grant, it must have effected that result, unless other objections defeat such purpose.

It is claimed that the instrument is void for uncertainty, in that no time certain is fixed for the execution of the purpose of the grant. It was, however, competent for Woods to make such a conveyance without any time limitations. He could convey an interest in the realty as absolutely as he could convey the whole of it. The right of way and the right to divert the water were a part of the realty itself. By the terms of the deed these were conveyed to the grantee, his heirs and assigns *forever*, sub-

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ject to certain specified reservations pertaining to the domestic use of the water by the grantor. The absence of specific time limitations must be construed to mean that no such were intended.

It is next urged that the deed is void for uncertainty as to the location of the right of way. It is true, the exact boundaries are not described in the deed, except as to the tracts of land over which the pipe line shall run. Such was true, also, in the case of *McCue v. Bellingham Bay Water Co.*, *supra*. After the execution of the deed granting a roving right of way, the water company in that case entered upon the land, selected a strip, and took possession of it as the right of way. The court said:

"When it went upon the land described in the deed and cleared and prepared its right of way, its grant became fixed and certain . . ."

In the case at bar the pleadings admit, and the evidence shows, that such a selection and occupation of a right of way strip took place in 1891. Not only was the route marked out and selected, but a ditch was dug upon the strip, with the intention of using the right of way for the purposes of the grant. Under the *McCue* case, the grant here therefore became fixed and certain as to location.

It is further contended that other uncertainties are fatal to the validity of the deed, viz: (1) That it is uncertain as to the amount of water to be diverted. The grant however covers all the water of Woods creek, except what is expressly reserved for domestic use of the grantor, and also for his use in case of fire, it being required that in the latter event he shall be served through a three-inch pipe connected with the main pipe line. (2) That it is uncertain as to the amount of water Woods reserved. The reservation was for all that one family may need for domestic and household purposes to be used upon a certain forty-acre

tract, and for such amount as the family may need in case of fire to the extent of the service capacity of a three-inch pipe. The amount reserved is therefore sufficiently certain. (3) That it is uncertain as to where Woods was to get the water, whether from the stream or pipe line. No specification was made for connecting with the pipe line, except by the three-inch fire main, which, it is manifest, was not to be used except in case of fire. It therefore follows with sufficient certainty that Woods was to get water for domestic purposes from the bed of the stream upon the described tract of land where it was to be used. (4) That it was uncertain as to the width of the right of way. In such case the way shall be of such width only as shall be reasonably necessary and convenient for the purpose for which it was created. "When the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment." *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. 533. We therefore think the deed was in no way void for uncertainty.

It is argued that the deed was invalid, for the reason that Hewitt did not acquire the lower riparian rights at the time he acquired his rights from Woods. It is not reasonable to suppose that all riparian rights could be acquired at the same moment. It cannot be doubted, however, that Hewitt did acquire from Woods the rights which were specified in the deed. It is true, lower proprietors may complain, if the waters shall be diverted without the acquisition of their rights. But that question in no way affects the transfer by Woods of the rights which theretofore attached to his land. It is those rights which are in controversy here. Having transferred certain rights of his own, he would not, were he here, be in position to say that the transfer was ineffective because it may interfere with lower proprietors. Interference with the rights of

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lower proprietors is a question to be raised by them, and not by Woods or by appellants as his successors in interest.

Another question argued is that of alleged fraud in procuring the deed from Woods. As set forth in our statement of the issues, the deed specified that the water was to be diverted for "water purposes at the town of Lowell." It is contended that it now develops that the purpose was to furnish water to the city of Everett, and that such fact was fraudulently concealed from the grantor. It sufficiently appears, however, that the grantor was informed and understood that the grant was sought for the purpose of procuring water, and a right of way for its transfer, for use in the new city which the grantee and his associates proposed should be built in that vicinity. Witnesses testified at the trial that the village of Lowell contained about one hundred people, and was unincorporated at the time the deed was made; that a postoffice was located there, called by that name; that the election precinct was designated by the same name, and that the general locality thereabout was commonly called "Lowell." Other witnesses disputed this. The real name for the proposed city, it appears, was not actually determined until after the deed was made, but the grantor knew that it was to be built in the vicinity of Lowell, and the court found that it was then generally termed Lowell as that was the nearest postoffice. The record discloses that respondent intends to supply water to what is still called Lowell, and we therefore think that, under all the circumstances surrounding the execution of the deed, and from facts which appear to have been well known to the grantor, fraud was not shown.

We must then look to the scope of the grant as it appears from the deed. The grant was for *all* the waters of Woods creek except what was reserved as hereinbefore stated. While it specified that the diversion was for water pur-

poses at the town of Lowell, yet it was not in terms restricted to that purpose. The estate granted being all the water exclusive of the reservation, what then are the grantee's rights in that estate, after he has applied so much thereof as is required to meet the purpose specifically mentioned in the grant? The granting instrument contains no words of prohibition against the use of the water for other purposes after the specified purpose has been served. In the absence of such prohibition, the grantee is entitled to use the surplus water for other purposes.

"When the easement is of a certain quantity of water, the owner is not bound to use it in a particular manner, though the purpose for which it is used is mentioned in the grant. He may use the water in a different manner or at a different place, or increase the capacity of the machinery which is propelled by it, without affecting his right, if the quantity used is not increased and the change does not prejudice the rights of others. This rule applies both to reservations and grants. If the use of water is granted for a certain purpose, with a prohibition against certain other specified uses, the grantee may use it for any purpose not prohibited." Gould, Waters (3d ed.), § 320.

See, also, *Izard v. May's Landing Water Power Co.*, 31 N. J. Eq. 511; *Mayor etc. of Baltimore v. Day*, 89 Md. 551, 43 Atl. 798. It follows that, after the inhabitants of Lowell have been served, respondent has the right to divert the remaining water, not reserved, to the use of the city of Everett and its inhabitants.

Appellants contend that the right of way was abandoned. Soon after the deed was made, and in the same year, the grantee selected a strip for right of way, and began the construction of a pipe line system. An outstanding lease, older than the right of way and water right, was held by one Crook. The deed was therefore subject to the lease, and the lease continued until 1896. An application by the lessee to enjoin the continuance of construction work, and

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the diversion of the water, was sustained by this court. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28. Nothing further could be done until after the lease expired in 1896. Meantime there was not an abandonment. The evidence shows that there was no such intention. Some of the constructed work was left in place, and material remained upon the ground. Occasional examination was made of a constructed dam, and debris was removed to prevent injury thereto. But it is insisted, further, that the failure to proceed promptly after the lease expired, together with the delay until 1902, amounted to abandonment. This court held, in *McCue v. Water Co.*, *supra*, that where no time is fixed for the occupation and use of a granted right of way, no mere non-user, for any length of time short of the period of the statute of limitations, will defeat the right of grantee to occupy and use it for the purposes of the grant. If the statute of limitations comprehends the running of time against a mere non-user, under a grant of this kind, it in any event did not begin to run until such time as the grantee might have peaceably occupied, which was after the lease expired in 1896. Active user was again attempted about August 1, 1902, and this suit was brought within the same month. A period of six years only having expired, it follows that the limitation period fixed by our statutes for actions pertaining to the possession of lands had not expired.

Appellants urge that injunction is not the proper remedy for respondent; but we think otherwise. It is the successor in interest of all rights under the grant. Appellants have succeeded as riparian owners with notice of the existence of the grant. They deny respondent the privilege of entering upon the land for the purpose of diverting the water. It has already been held, in the case of the lessee, that he could enjoin the diversion because he

held a superior estate, and had a right to prevent, by injunction, the threatened interference with his enjoyment of it. Now appellants are threatening to prevent respondent from enjoying its estate, and it would seem that it may adopt the same remedy as was sustained in the other case.

It will be remembered, from the statement of the case, that the court refused to grant the injunction as to that portion of the present proposed right of way which departs from the route selected and marked out in 1891; but held that it would restrain appellants as to the new part of the route for a period of thirty days, and would make the injunction permanent, if condemnation proceedings should be instituted by respondent within that time and should thereafter be prosecuted with reasonable diligence. The precedent for such a course was set by this court in *New Whatcom v. Fairhaven Land Company*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190, which was, also, a case involving the exigencies of a city water supply. We see no reason for not approving the same course here.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4957. Decided February 21, 1905.]

JAMES N. WINDSOR *et al.*, Respondents, v. ST. PAUL,
MINNEAPOLIS & MANITOBA RAILWAY COMPANY,
Appellant.¹

EVIDENCE—WRITTEN CONTRACTS—VARYING BY PAROL—ADDITIONAL CONSIDERATION. While the terms of a written contract may not be varied by parol, it is competent to show that, at the time of the making of a written contract of sale of land to a railroad company for a specified consideration, there was a collateral oral agreement to the effect that certain fences and guards were to be

¹Reported in 79 Pac. 613.

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built and maintained by the company as part of the consideration for the sale, since oral testimony is competent to show a consideration additional to that expressed in the contract.

SAME—PRINCIPAL AND AGENT—DISPUTING AUTHORITY—RATIFICATION. Where a railroad company accepts a deed of land purchased for it by an agent, it cannot dispute the agent's authority to agree to pay a consideration additional to that recited as the consideration in the deed.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered July 8, 1903, upon the verdict of a jury rendered in favor of the plaintiffs for damages for breach of contract, after a trial on the merits. Affirmed.

M. J. Gordon and C. A. Murray, for appellant.

Samuel R. Stern, for respondents.

DUNBAR, J.—The complaint alleges, in substance, the ownership of a certain quarter section of land; that appellant, being desirous of acquiring certain additional rights, agreed with respondents to put up suitable gates and fencing, and, in consideration of such agreement, respondents deeded to appellant seven acres of said land, all upon condition that said property should be properly fenced and proper gates erected, so that no damage could ensue to respondents by reason of cattle or horses straying upon said property; that, by reason of the failure of appellant to erect said gates and build said fences, cattle and horses were enabled to, and did, stray upon a portion of respondents' property, and destroyed growing crops and grass growing thereon, to respondents' damage in the sum of \$1,250. Appellant answered, denying that it made any such agreement, or that said land was deeded for any consideration other than cash consideration, paid to plaintiffs for said land. Judgment was rendered, in favor of respondents, for \$366.

It appears that one Des Brisay, the right of way agent for appellant, had, for a term of some two years, been trying to negotiate with respondents for the additional right of way which was finally obtained, but they reached no agreement. Afterwards, according to the testimony of the respondents, Des Brisay sent one Hirst, who was an employee of the railroad company in some capacity, to respondents to see if the deal could not be consummated. Respondents entered into a contract in writing with Hirst, presuming him to be the agent of the company. This contract was signed, one dollar paid by Hirst to bind the contract, and the deed was afterwards made in pursuance of the condition of the contract.

According to the testimony of the respondent James N. Windsor, he had, at all times when the matter was spoken of, insisted that he would not sell the land, unless the railroad company would put in guards and fences to preserve the crops. Several propositions had passed between the agent and Windsor, prior to the time the contract was finally entered into. The contract was finally made without any reservation, or any provision in reference to the building of fences by the company, but testimony was introduced showing that there was a collateral oral agreement to the effect that the fences and the guards were to be built and maintained by the company. In fact, there was pinned to the agreement, which was brought there by Hirst through the direction of Des Brisay, a statement from Des Brisay that, if Windsor would sign the agreement, the railroad company would build the fences and guards, as Windsor had previously demanded. According to the testimony of Windsor, and other members of his family, this attached statement was lost, and it was not produced at the trial. The testimony of Des Brisay was to the effect that, in such appended agreement, he did

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not agree to build the fences, but only agreed to put a crossing in on the land where Windsor had previously asserted that he wanted it placed, and that the agreement said nothing about fencing the land. It is also testified by the respondents, and other witnesses, that Mr. Hirst represented to Windsor that, if he signed the contract, the fencing would be made by the company according to his desires. Whereupon Windsor called several persons forward as witnesses, stating that he signed the contract on the condition that the land deeded was to be fenced by the railroad company. Mr. Hirst does not deny this, but he says that he simply told Mr. Windsor that the company was fencing all its lands as fast as it could, and he had no doubt that it would fence this particular land; and further than that he had no authority to speak. On all these questions of fact, as to what the agreement actually contained, as to what Mr. Hirst and Mr. Windsor respectively said, at the time the contract was entered into, the jury have passed, and we will not discuss them further.

It is contended, however, by the appellant, and that is the main contention in this case, that its objection to the testimony, in relation to the oral agreement which was made by the appellant, ought to have been sustained by the court, and that the court erred in not sustaining it. It is true, beyond dispute, that the general rule is that the terms of a written agreement cannot be contradicted or varied by oral testimony. This is upon the theory that all the propositions which have been discussed pro and con between the parties to the contract have been finally merged in the written agreement, and it becomes the express mutual contract of the parties; and this rule is salutary for the purpose of giving stability and credibility to written contracts. It is also true that, where the written contract undertakes to express all the conditions surrounding the

transaction with reference to which the parties are contracting, oral testimony in regard to those transactions is inadmissible. But it is equally well established that matters which are independent of the contract may be proven by oral testimony. The trouble in each particular case is to determine whether the case falls within the general rule or within the exceptions to it.

The appellant in this instance relies largely upon the decision of this court in *Gordon v. Parke etc. Mach. Co.*, 10 Wash. 18, 38 Pac. 755, where it was held that a written contract, which enters minutely into the details of the agreement between the parties, indicates on its face that all its terms have been reduced to writing, and it cannot be added to or varied by parol proof of agreements that are in no wise collateral to, or independent of, its subject matter. In that case there was a sale of goods, made in writing, and an oral contract between the parties to the effect that, in consideration of such contract of sale, the seller would not engage in the same business in the same city, and it was held that that was not such a collateral undertaking as to permit parol proof thereof in explanation of the written contract. But the court said:

"Now the contract here to be considered was one of great detail, and entered minutely into all the matters undertaken by both parties, and was executed by both. It covered the sale of the stock, accounts and lease of the place of business of the appellant in Spokane, with its furniture, fixtures and books. The complaint says that the respondent's purpose in making the purchase was to continue business in the same line theretofore followed by appellant, in Spokane, with the merchandise to be sold to him, and that the object of the agreement that appellant would no longer carry on business at that place was to prevent competition with him in the disposal of the goods acquired by him. If so, then, to the extent that the agreement referred to the goods which were the subject of the contract, it was

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certainly not collateral or independent, and we should expect to find some mention of the arrangement in a contract so precise in its terms and so formally drawn as this one. Not finding it there, the law concludes that the agreement alleged was not made, however much the appellant may have intended not to re-open business in Spokane."

But it seems to us that that is not a parallel case in principle with the one at bar. Here there is no detail expressed in the written contract. It was a plain contract of sale, expressing only the consideration of \$280, and did not undertake to enter into any description, or to delineate the conditions surrounding the lands sold, in any way. It is well established that oral testimony may be introduced to show consideration additional to that expressed in the contract. A case which is very nearly parallel to the one at bar is *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831, where it was squarely held that a consideration for a fence additional to that recited in the deed might be shown, and it was said:

"It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid, though not thereby to impeach the title conveyed by the deed;"

citing Washburn, Real Property (3d ed.), 327; *Kimball v. Walker*, 30 Ill. 510; *Villers v. Beamont*, 2 Dyer 146; Phillips, Evidence, 482; *Elden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Shephard v. Little*, 14 Johns. 210, where it was said by the court:

"Although you cannot, by parol, substantially vary or contradict a written contract, yet these principles are inapplicable where the payment or amount of the consideration becomes a material inquiry."

To the same effect are, *Bowen v. Bell*, 20 Johns. 338, 11 Am. Dec. 286; *McCrea v. Purmort*, 16 Wend. 460, 30

Am. Dec. 103; and *Wilkinson v. Scott*, 17 Mass. 249, where it was held that the receipt or acknowledgment of the payment of the consideration in a deed was only prima facie or presumptive evidence of it, and was open to explanation by parol. This case also decides the very important proposition involved in the case at bar, viz., that a corporation, after accepting a deed of land purchased by one of its officers, cannot dispute the officer's authority to agree to pay a price additional to that recited as a consideration in the deed. The court submitted the question of the authority of Hirst to the jury, we think, under proper instructions. If Hirst was not the agent of the appellant, it would be difficult to tell whose agent he was. Certainly he was not the agent of the respondent Windsor, for his interest was adverse to Windsor's. He was urging a contract in the interest of the company. It is true that Des Brisay says that he only sent him as a messenger. But he was evidently something more than a mere messenger. He was authorized to make the contract. Des Brisay said that the reason he sent him was that he was not able to negotiate with Windsor. He also authorized him to take neighbors along for the purpose of urging Windsor to enter into the contract. The company received the benefits of this transaction, Windsor doubtless was bound by it, and the company, after a ratification of the contract which was brought about through the agency of this man, ought not to be allowed to dispute his agency in its interest. The case just quoted in discussing the case says:

"Had the company any right to assume, from a mere knowledge of the deed, that his agent had not agreed to pay any additional consideration? If it had, then the consideration named in the deed is conclusive and not merely prima facie or presumptively the whole amount. But we have seen that other and additional consideration may rest in a parol promise. Does it not follow that, the company

having given the agent authority to make the purchase, such authority extended to the amount of consideration to be paid even beyond that named in the deed? . . . But, again, 'it is a general rule that, when a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent.' So a debtor cannot have the benefit of a compromise and release effected by his agent with his creditors, without adopting all the representations made by the agent to the creditors in negotiating the same."

In *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892, this court held that a verbal contract by the grantee of mortgaged premises to assume the mortgage thereon is enforceable as a contract independent of the deed of conveyance, and additional to it, which is not merged in the executed deed, and, therefore, does not fall within the rule forbidding the introduction of parol testimony to vary, alter, or add to a written contract; citing *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964, where we held that a promise by the purchaser of certain saw logs, as part consideration therefor, to assume and pay the indebtedness of the seller to a third party, might be shown by parol evidence, notwithstanding the bill of sale of the logs, while expressing a good consideration, made no mention of the purchaser's promise to pay the indebtedness to such third party. And in *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121, we held that parol evidence was admissible for the purpose of showing that, by a contemporaneous oral agreement, a written contract between the parties, providing for payments of money, had been so far modified as to permit the stipulated payments to be rendered in services instead of money. To the proposition that parol evidence is admissible to show the true consideration of the deed, see, *Patrick v. Leach*, 2 Fed. 120; *Bever v. North*, 107 Ind. 544, 8 N. E. 576; *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274; *Keith v. Briggs*, 32

Minn. 185, 20 N. W. 91; *Dean v. Adams*, 44 Mich. 177, 6 N. W. 229; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889.

With this view of the law of the case, it is not necessary to discuss the instructions objected to by the appellant, and, there being no reversible error in the record, the judgment will be affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4935. Decided February 21, 1905.]

JOHN CATLIN *et al.*, Respondents, v. KATHARINA
MURRAY, Appellant.¹

MORTGAGES—REDEMPTION—ACTION FOR—LIMITATION OF ACTIONS.
Where the mortgagee has been placed in possession for the purpose of collecting and applying the rents, and there has been no foreclosure, an action to redeem from the mortgage is not barred, since the statute of limitations does not commence to run while the relation of mortgagor and mortgagee exists.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered May 2, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, decreeing an accounting and redemption from a mortgage. Affirmed.

Graves & Englehart, for appellant, contended, among other things, that the right to foreclose and the right to redeem are reciprocal, and redemption is barred in the same time as foreclosure. 2 Jones, Mortgages, § 1146; *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. 613; *Koch v. Briggs*, 14 Cal. 257, 73 Am. Dec. 651; *Cun-*

¹Reported in 79 Pac. 605.

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Opinion Per Curiam.

ningham v. Hawkins, 24 Cal. 403, 85 Am. Dec. 73; *Arington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Henderson v. Grammar*, 66 Cal. 332, 5 Pac. 488; *Green v. Turner*, 38 Iowa 112; *Parsons v. Noggle*, 23 Minn. 328. The relation of mortgagor and mortgagee ceases to exist, if after breach, the mortgagee goes into possession. 2 Jones, Mortgages, § 1145; *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357.

Kauffman & Frost, for respondents.

PER CURIAM.—This suit was brought by the respondents for the purpose of redeeming the lands described in the complaint from a mortgage, and demanding an accounting from the appellant as the assignee of the mortgagee. The court made and entered findings of fact and conclusions of law, and rendered a decree in favor of respondents. The court, among other things, found, that on the 16th day of November, 1892, one William H. Beck was the owner of the land in question and delivered to one Thomas B. Goodwin a mortgage upon said lands, which was duly recorded, and was conditioned to save said Goodwin harmless from any and all liabilities which might then have been incurred by him by reason of his having become surety for Beck upon several written obligations; that, prior to the commencement of the suit to foreclose said mortgage, Beck placed Goodwin in possession of said premises, upon the agreement and understanding that he should apply the rents and profits thereof to the reduction of the debt by said mortgage secured, and Goodwin and his successors in interest have ever since remained in possession of said premises, receiving the rents and profits thereof; that on the 4th day of May, 1895, for valuable consideration, the said Beck sold and conveyed to plaintiff John Catlin the lands hereinbefore described, and the same ever

since have been, and now are, the property of said John Catlin and of his wife, his co-plaintiff herein; that the plaintiffs are entitled to an accounting, and to a decree permitting them to redeem from the mortgage by paying into court the sum of \$1,760.30, within thirty days, and for costs. Certain exceptions were made to some of the findings, but we think the testimony substantially justified the findings.

The principal question in this case is, whether the action was barred by the statute of limitations. But we think the principle involved was decided adversely to appellant's contention in *Krutz v. Gardner*, 25 Wash. 396, 65 Pac. 771, where it was held that, as long as the relation of mortgagor and mortgagee exists, the statute does not commence to run in favor of either the mortgagor or the mortgagee. Under the testimony in this case the appellant is holding under Goodwin who, the testimony shows, was placed in possession as mortgagee, and there having been no foreclosure, the action was not barred by the statute of limitations, and the judgment is affirmed.

[No. 4898. Decided February 21, 1905.]

PAUL W. LAW, *Appellant*, v. E. A. SEELEY, *et al.*,
Respondents.¹

APPEAL AND ERROR—REVIEW—IMPROPER EVIDENCE ON TRIAL DE NOVO. Where the cause is tried *de novo* on appeal, improper evidence is not ground for reversal, since it will be disregarded.

SAME—REVIEW OF FINDINGS—CONFLICTING EVIDENCE. The findings of the trial court will not be disturbed when justified by the whole evidence, and there is an irreconcilable conflict in the testimony.

Appeal by plaintiff from a judgment of the superior

¹Reported in 79 Pac. 606.

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Opinion Per MOUNT, C. J.

court for King county, Tallman, J., entered June 16, 1903, upon findings of the court after a trial on the merits without a jury, determining the amount of plaintiff's commissions upon a sale. Affirmed.

Morton E. Stevens, for appellant.

MOUNT, C. J.—The respondent Seeley in 1901 had a bond on some mining property which he desired to sell. In November of that year he entered into an oral agreement with the appellant, whereby appellant was to find a purchaser for the said property, and respondent Seeley was to divide the profits with appellant on such sale "in such proportion as would be just and right." Appellant found a purchaser, and the profits on the sale amounted to \$13,500 in cash, and 9,000 shares of the capital stock of the Mexican Mines & Industrials Company, a corporation. Appellant thereupon claimed an equal division of such profits, which respondent Seeley refused to pay. This suit was brought to collect the amount claimed. Upon the allegations of the complaint, an injunction was issued, issues were made up, and the cause tried to the lower court without a jury. Upon the trial the court found the profits as above stated, but that respondent had expended the sum of \$2,101 in procuring the sale, and that appellant was entitled to ten per cent of the net profits of the sale under the agreement, and entered judgment accordingly. Plaintiff appeals.

Several assignments of error are made but only two are presented here, viz.: (1) that the court improperly admitted certain evidence, and (2) that the findings were not in accordance with the preponderance of the evidence. Conceding that improper evidence was admitted, the cause is examined here *de novo*, and such evidence is disregarded. A case tried by the court will, therefore, not be reversed on

that ground. Upon the question of fact, appellant contends that the preponderance of the evidence is to the effect that he is entitled to an equal division of the profits of the sale. We have examined the evidence upon this point and find an irreconcilable conflict therein. Many witnesses say that the usual division under such contract is fifty per cent; others, that the customary and usual division varies from two and one-half to ten per cent of the net profits. The lower court found that ten per cent was just and right. From the whole evidence we think the lower court was justified in making this finding.

The judgment is therefore affirmed.

DUNBAR, FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5347. Decided February 23, 1905.]

J. L. BRYANT *et al.*, *Appellants*, v. FRANK H. LAMB
TIMBER COMPANY, *Respondent*.¹

WATERS—RIPARIAN RIGHTS—INJUNCTION AGAINST FLOODING—EVIDENCE—FAILURE OF PROOF. In an action brought by a lower riparian owner to recover damages for the flooding of plaintiff's land, the complaint stating also a second cause of action for an injunction against the maintenance of a dam, in which the cause of action for damages was submitted to a jury, there is a total failure of proof as to the second cause of action for an injunction, and the same is properly dismissed, where said cause was submitted to the court upon the testimony introduced at the jury trial, which was confined to the injuries already received, without proof that the dam is still maintained or that the injury will be repeated in the future.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered April 11, 1904, dismissing on the merits plaintiff's second cause of action for an

¹Reported in 79 Pac. 622.

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Opinion Per RUDKIN, J.

injunction, submitted to the court without a jury upon the testimony introduced at a trial for damages, in an action for damages for flooding lands and to enjoin the maintenance of a dam. Affirmed.

W. H. Abel, for appellant.

RUDKIN, J.—The plaintiffs are the owners of a tract of land in Chehalis county, extending for a distance of about three-fourths of a mile along the bank of a stream called "Black Creek." The defendant company has been engaged in operating a logging camp on the same stream, about two miles above the plaintiffs' lands. For the purpose of facilitating its logging operations, the defendant company built a dam across the stream, about twelve feet in height, a short distance above the plaintiffs' lands. The waters of the stream were retained and stored in this dam, and were released from time to time, to sluice the logs down the stream. By these operations, the plaintiffs' lands were flooded and washed away. In addition to the injury caused by flooding and washing, the defendant company cut the brush from the banks of the creek on the plaintiffs' lands, and blasted out stumps and logs, and committed other trespasses thereon.

The complaint contained two causes of action; the first, to recover damages for the injuries above set forth, and the second, for injunctive relief to prevent future injury. The second cause of action made the first cause of action a part thereof by reference, and alleged, (1) that the defendant company was threatening to dam the stream below the plaintiffs' lands, whereby the plaintiffs' lands would be flooded and injured; and (2) that the plaintiffs' lands were flooded and injured by the dam maintained above the same, that the plaintiffs had requested the defendant company to cease using and maintaining said dam, but that the defendant company refused so to do, and would

continue to use and maintain said dam, to the great damage and injury of plaintiffs, unless restrained from so doing. The answer was a general denial. The first cause of action was tried before a jury. A verdict was returned for the plaintiffs, and a judgment entered thereon. Thereafter the second cause of action was submitted to the court on the testimony taken at the jury trial, the allegation of the second cause of action relating to the construction of the dam below the lands of plaintiffs was stricken by consent, and the court entered a judgment dismissing the second cause of action. From the latter judgment the plaintiffs appeal.

Had the appellants established the facts alleged in their second cause of action, they would have entitled themselves to an injunction under the decisions in *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046, and other cases in this court. A careful examination of the entire record, however, discloses no ground for reversing the judgment of the lower court denying the injunction. No proof was offered in support of the second cause of action, and such proof was indispensable before the court could interfere by injunction. At the jury trial—and the testimony there taken is the only testimony before this court—the parties were strictly limited to proof of injuries occurring between the 1st day of September, 1902, and the 8th day of July, 1903, when this action was commenced. It is needless to say that proof of such injuries alone would not authorize an injunction. For these injuries the appellants have already received compensation in damages, and, as to them, an injunction would be wholly inoperative. In other words, there was a total failure of proof as to an essential part of the second cause of action, without proof of which no injunction could properly be awarded. It nowhere ap-

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pears that the injury complained of will be repeated, or that the respondent is still maintaining its dam, or threatens to maintain the dam in the future, or that an injunction, if granted, would be of any avail to the appellants.

For these reasons there is no error in the judgment of the court dismissing the second cause of action, and such judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

Root and Crow, JJ., took no part.

[No. 5452. Decided February 23, 1905.]

ANDREW MORRISON, *Respondent*, v. MARIETTA SHIPMAN
et al, *Appellants*.¹

TAXATION—FORECLOSURE OF LIEN—JUDGMENT—PARTIES—STRANGER AND UNKNOWN OWNERS. Where taxes were assessed to unknown owners, a judgment foreclosing a tax certificate of delinquency in a proceeding instituted against one S and unknown owners, is not invalid because S was a stranger to the record, since it would have been valid against unknown owners alone, where the property was assessed to unknown owners.

Appeal from an order of the superior court for King county, Bell, J., entered June 3, 1904, overruling a motion to vacate a tax foreclosure judgment entered July 15, 1903. Affirmed.

Lewis Henry Legg, for appellants.

J. B. Bridges, for respondent.

PER CURIAM.—This is an appeal from an order denying a motion to vacate a tax judgment. It appears that one Emily Shipman was the owner of the property in con-

¹Reported in 79 Pac. 632.

37	171
38	13
38	14
38	606
37	171
40	258
37	171
41	41

troversy, prior to her decease in the year 1895. For the year 1898, the property was assessed to unknown owners, and a certificate of delinquency was issued for the taxes of that year. The certificate stated that the owner was unknown. The action brought to foreclose this certificate of delinquency was against Emily L. Shippen, and all persons unknown, if any, having or claiming an interest in the property. It is conceded that, if the foreclosure proceedings had been instituted against an unknown owner, the judgment would be valid; but it is claimed that, by reason of the fact that such proceedings were against Emily L. Shippen, a stranger to the title, and all persons unknown, if any, having or claiming an interest in the property, such proceedings are void and should be set aside. If a tax foreclosure against an unknown owner is valid—and this court has so held in case the property is assessed to an unknown owner—it would seem to follow as a matter of course that a proceeding against an unknown owner and others would be equally valid.

The appeal is without merit, and the judgment is affirmed.

[No. 5473. Decided February 23, 1905.]

J. S. CREECH *et al.*, *Respondents*, v. HUMPTULIPS BOOM
AND RIVER IMPROVEMENT COMPANY, *Appellant*.¹

WATERS—OBSTRUCTION OF NAVIGABLE SLOUGH—FLOATING OF LOGS
TO MARKET—DELAY—DAMAGES—ITEMS RECOVERABLE—PLEADING—
COMPLAINT—SUFFICIENCY. In an action for damages for the ob-
struction of a navigable slough by the storage of logs therein,
where it was alleged generally in the complaint, that the plaintiffs
were prevented from putting their logs therein and bringing them
to market, and were put to great delay and expense and prevented
from using their logging engine and keeping their men employed,

¹Reported in 79 Pac. 633.

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Opinion Per RUDKIN, J.

to their damage in the sum of \$500, and \$25 per day thereafter, it is proper, in the absence of a demand for a bill of particulars or motion to make more definite, to receive evidence that plaintiffs' logging engine and crew of men were idle for a certain period, and that the crew was discharged and another hired at a higher rate of wages; since the complaint sufficiently covers such items of damage, and the obstruction was the natural and proximate cause thereof.

SAME—REMOVAL OF OBSTRUCTIONS—DENIAL OF RIGHT—MEASURE OF DAMAGES—INSTRUCTIONS. In an action for damages for the obstruction of a navigable slough by the storage of logs therein, where the defendant denied that the same was navigable or a public highway, claiming the right to use and obstruct the same under a lease from abutting owners, it is proper to deny the defendant's request for instructions to the jury to the effect that, if the plaintiffs could have removed the obstructions without a breach of the peace, the measure of their damages would be the cost of such removal and damages for the delay during the time reasonably necessary to remove the same.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 15, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for the obstruction of a navigable slough by the storage of logs therein. Affirmed.

John C. Hogan, for appellant.

J. B. Bridges, for respondents.

RUDKIN, J.—This was an action to recover damages caused by the obstruction of a navigable stream or slough. The complaint alleged, generally, that the plaintiffs had purchased a quantity of merchantable timber in Chehalis county, and that, under the contract of purchase, they were required to remove the timber from the land within one year from date of purchase, and that the only practicable or available way to remove the timber from the place of purchase to market was through a certain slough, connected with the Chehalis river, and thence down the river to the

mills; that this slough was navigable for the purpose of floating logs; that the defendant company had stored large quantities of logs in this navigable slough, thereby wholly obstructing the same, so that the plaintiffs, for a long period of time, were unable to use the slough for the purpose of floating their logs to market; that the plaintiffs had requested the defendant company to remove its logs, so stored in the slough in question, and to cease obstructing the same, but that the defendant company failed, neglected and refused so to do, for a period of more than six weeks; that the plaintiffs had cut a large quantity of the timber so purchased, and sawed the same into logs and piling, and were in great need of placing the same in said slough for the purpose of transporting the same to market, but were unable to do so by reason of the obstructions complained of; that, at various times during the thirty days prior to the commencement of this action, the plaintiffs had notified the defendant company of their desire to place their timber in the waters of said slough, and had notified the defendant company that the plaintiffs were greatly damaged by said obstructions, and that they had cut large quantities of logs and piling, and that they were in great need of marketing the same; that they were greatly delayed and were put to great expense by reason of said obstruction; that they were unable to use their logging engine which was upon said land, and were unable to keep the hired help in their camps employed; that the plaintiffs had been damaged in the sum of \$500 by reason of such obstructions, and would be damaged thereafter in the sum of \$25 for each and every day until such obstruction was removed. The prayer of the complaint was for an injunction and for damages. At the trial no claim was made for injunctive relief, and the question of damages was tried before a jury. From a judgment en-

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tered upon the verdict in favor of the plaintiffs, this appeal was taken.

Under the complaint, the substance of which is stated above, the respondents offered to prove the following items of damage: (1) That their logging engine was idle for a certain period of time; (2) that their crew of men was idle for a certain period of time; and (3) that they were compelled to discharge their crew of men, and employ others at a higher rate of wages, all because of the obstructions complained of. To this offer the appellant objected, on the ground that the damages claimed were special, and were not specially or sufficiently pleaded. In the absence of a demand for a bill of particulars, or a motion to make the complaint more definite and certain, we think the complaint was sufficiently specific to cover and admit proof of the items of damage claimed. The appellant was sufficiently advised by the complaint that the respondents were damaged, and of the nature and extent of the damages claimed. We are also of the opinion that the obstruction of the slough was the natural and proximate cause of all such items of damage.

The first instruction complained of referred to these three items of damage, and, for the reasons already stated, the court committed no error in giving such instruction.

The appellant requested the court to instruct the jury that, if they believed from the testimony that the slough in question was navigable and a public highway, and that the appellant obstructed the same by placing logs therein, and that such obstruction was specially injurious to the respondents, and that the respondents could have removed such obstructions without committing a breach of the peace, and the appellant did not prevent their so doing, the respondents would not be entitled to recover from the appellant any greater amount of damages than the reasonable

cost of removing the obstructions, and such further damages as resulted from the delay of their business, during such length of time as was reasonably necessary to remove the same. The appellant company, by its answer, at the trial, and at all times prior thereto, denied that the slough in question was navigable or a public highway, and claimed the absolute and exclusive right to use and obstruct the same, under a lease from the abutting property owner. Under these circumstances, there was no error in the refusal of the court to give the instruction requested.

Finding no error in the record, the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

Root and Crow, JJ., took no part.

[No. 5464. Decided February 23, 1905.]

EDWARD DOLAN, *Appellant*, v. F. E. JONES *et al.*,
Respondents.¹

QUIETING TITLE—ACTION TO CANCEL VOID TAX DEED—PLAINTIFF NOT IN POSSESSION. It is error to dismiss an action brought by one out of possession to cancel a void tax deed and judgment, and asking that his title be quieted, since the rule that an action to quiet title cannot be maintained by one out of possession, applies only where the plaintiff has a complete remedy at law, and this is not an action to quiet title within such rule.

JUDGMENT—VACATION—VOID PROCESS—RECITALS AS TO DUE SERVICE. The recital in a tax foreclosure judgment of due service of process is sufficiently overcome where it clearly appears from a void summons by publication, the sheriff's return, the proof of publication, the fact of the death of the principal defendant prior to service, and the testimony of the plaintiff in the tax suit, that the only service of process was by the publication of a summons which was insufficient to confer jurisdiction.

¹Reported in 79 Pac. 640.

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Citations of Counsel.

SAME—PROCESS—TAXATION—FORECLOSURE OF TAX LIEN—FORM OF SUMMONS. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered May 31, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to cancel a tax deed. Reversed.

A. M. Abel and T. H. McKay, for appellant, contended, among other things, that this is not an action to quiet title. 3 Pomeroy, Equity Jur., § 1189; *Damon v. Leque*, 14 Wash. 253, 44 Pac. 261; *Dormitzer v. German Sav. etc. Soc.*, 23 Wash. 190, 62 Pac. 862; *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572; *Cockerill v. Stafford*, 102 Mo. 57, 14 S. W. 813; 17 Ency. Plead. & Prac., pp. 950-955. The recital in the tax judgment as to due service was overcome by admissions in the answer that no other summons was served, by the evidence of the entire judgment roll showing but one service, by the fact that there was not sufficient time for another service, by the deposition of the defendant therein that he was not served, and by the testimony of the plaintiff therein that he made and paid for only one service. *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043. This distinguishes this case from *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20, and *Christofferson v. Pfennig*, 16 Wash. 441, 48 Pac. 264.

John C. Hogan, for respondents, contended, *inter alia*, that the action cannot be maintained by one out of possession. *Smith v. Wingard*, 3 Wash. Ter. 291, 13 Pac. 717; *Corporation of the Catholic Bishop v. Gibbon*, 1 Wash. 592, 21 Pac. 315; *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531;

Reichenbach v. Washington etc. R. Co., 10 Wash. 357, 38 Pac. 1126; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141; *Povak v. Lee*, 29 Wash. 108, 69 Pac. 639. The recital of due service is not overthrown by showing that the only service disclosed by the record was illegal. *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067, 101 Am. St. 993; *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 131; *Kiser v. Canfield*, 17 Wash. 417, 49 Pac. 1064; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724; *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. 757; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73.

RUDKIN, J.—On the 14th day of December, 1900, the defendant, F. E. Jones, commenced an action in the superior court of Chehalis county, in this state, to foreclose a delinquency certificate on the lots and lands in controversy in this action. There was no appearance by any person in the foreclosure proceeding, and the only process served was the publication of a summons, citing the defendants "to appear within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action or pay the amount due," etc. The summons was signed by the plaintiff's attorney, and beneath his signature was, "Date of first publication, Dec. 14, 1900." On the 21st day of March, 1901, a decree of foreclosure was entered by default, directing the sale of the property described in the delinquency certificate. On the 6th day of April, 1901, the property was sold pursuant to said decree and order of sale, and bid in by the plaintiff in said action, who is one of the defendants in this action. On the 11th day of February, 1904, the plaintiff in this

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action, who is the successor in interest to the original owner of the property in controversy, brought this action in the court below, setting forth his title to the property, the proceeding to foreclose the delinquency certificate as above stated, the fact that there was no appearance therein and no service of process, except the publication of the summons above specified, and asked that the tax proceeding and tax deed be decreed null and void, that he be permitted to redeem from the tax sale, and that his title be quieted. The plaintiff also tendered all taxes and assessments which had been paid by the defendant Jones. Judgment of dismissal was entered in the court below, from which this appeal is taken.

The first question raised by the respondents is that this is an action to quiet title, and inasmuch as the appellant is not in possession and the lots are not vacant or unoccupied, the court had no jurisdiction, and the action could not be maintained. We do not think that this is an action to quiet title, as claimed by the respondents. The reason why a person cannot maintain an action to quiet title to lands in the possession of another is that the party out of possession has a full and complete remedy in an action at law to recover possession. The appellant here had no such remedy. In an action at law to recover possession he would be concluded by the tax judgment and sale, which he could not attack collaterally. The only remedy open to the appellant was either to move directly in the tax foreclosure case to vacate the tax judgment, or to bring an independent suit in equity for that purpose. He chose the latter course, and we hold that he is properly before the court.

The second objection urged by the respondents is that there is nothing in the record to overcome the finding of the court, in the tax foreclosure case, "that summons and notice has been duly served in this proceeding, as required by the

statute of this state and such statute complied with in all respects pertaining thereto." From the affidavit for publication of summons, the return of the sheriff, the proof of publication, the fact that the principal defendant, to whom the summons was directed, died some years before the service, and from the testimony of the respondent Jones himself, it clearly and satisfactorily appears that no service was made, except by the publication of the summons hereinbefore described, and the validity of the tax judgment must depend on the sufficiency of such service.

In *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, the form of the summons was, "You are hereby summoned to appear within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action or pay the amount due," etc. In that case, as in this, the summons was subscribed by the plaintiff's attorney, and underneath his signature was "First publication Feb. 23, 1901." From the foregoing statement, it will be seen that the two summonses are identical in every respect, and each was issued and published under the same law. Laws 1897, p. 182, § 96, subd. 3. In the case just cited this court says:

"The summons which was published in the foreclosure proceeding required the defendant to 'appear within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action or pay the amount due, together with costs,' etc. This summons was not in accordance with the statute, and its publication did not confer upon the court jurisdiction to render the judgment which was entered in the foreclosure proceeding. And the judgment was therefore not merely irregular, but void."

This decision was reaffirmed in *Smith v. White*, 32 Wash. 414, 73 Pac. 480, and *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536. Counsel for respondents cite the case of *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385, to sus-

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Opinion Per RUDKIN, J.

tain the form of summons published in this case. The decision in that case was based upon the act of 1901, Laws 1901, p. 383, § 1, subd. 2. The latter act required the defendant to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication; and the summons in the case cited followed the statute, except the date of first publication was stated at the foot of the summons, instead of in the body thereof. This court held that a statement of the date of the first publication, beneath the signature of the plaintiff's attorney, formed a part of the summons, and fixed a definite and certain time in which the defendant should appear. There is no analogy between the two cases. The statement of the date of first publication at the foot of the summons, in the case at bar, furnished no information whatever, as the time for appearance was to be computed from the date of service, and not from the date of first publication.

For the foregoing reasons the tax judgment and sale were null and void, and the appellant is entitled to the relief prayed for in his complaint. The judgment is therefore reversed, with directions to enter a judgment cancelling the tax judgment and tax deed, upon payment of all taxes and assessments heretofore paid by the respondents, with interest to date of tender in the court below.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 4987. Decided February 23, 1905.]

JOHN A. PEASE, *Respondent*, v. ANNA C. BUCKLEY,
Appellant.¹

QUIETING TITLE—PLEADINGS—ANSWER—FORMER ACTION AS A BAR—UNFOUNDED ADVERSE CLAIMS. It is not a valid answer to an action to quiet title, nor a bar to the suit, that the plaintiff had foreclosed a tax certificate and secured a tax deed upon the same property in an action against the same defendant, who made default after personal service, and that the defendant claims no interest or estate acquired since such foreclosure, since the action would lie against prior and unfounded adverse claims, impliedly admitted by such answer, thereby warranting judgment on the pleadings in favor of the plaintiff.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered October 26, 1903, upon the motion of plaintiff for judgment on the pleadings, in an action to quiet title. Affirmed.

Frank D. Nash, for appellant.

Edward E. Cushman and *R. F. Laffoon*, for respondent.

FULLERTON, J.—This is an action to quiet title. The complaint of the respondent, who was plaintiff below, is the ordinary one in such cases. The appellant answered as follows (omitting formal parts):

"That heretofore and on April 8th, 1902, in an action then pending in the superior court of Pierce county, Washington, No. 946 of tax foreclosure cases, in which action John A. Pease, the plaintiff herein, was plaintiff, and Anna C. Buckley and others were defendants, brought to foreclose a tax sale certificate for taxes for the year 1897, and the lien of other taxes, alleged to have been paid by plaintiff, levied and assessed against the property described in the complaint herein, with other property in Buckley's Addition to Tacoma, judgment and decree was rendered upon personal service of the summons upon the defendant here-

¹Reported in 79 Pac. 627.

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Opinion Per FULLERTON, J.

in within the state of Washington for the sum of \$474.76 taxes, interest and penalty found to be due, and \$12.00 costs, which sums were decreed to be a lien upon the property described in the complaint herein and the other property described in said action; and in said judgment and decree the property described in the complaint herein was directed to be sold to pay said judgment and decree; that said judgment is unreversed and no appeal has been taken therefrom; that on April 19th, 1902, pursuant to the direction contained in said decree, all of the property described in the complaint herein was sold to and bid off by plaintiff and a deed therefor was issued and delivered to him, and plaintiff went into possession of the property described in the complaint herein by virtue of said judgment, sale and deed; that defendant has acquired no title or interest in the property described in the complaint herein since said tax foreclosure suit was commenced, and she claims no estate or interest in said property acquired since said tax foreclosure suit was commenced. Defendant pleads and alleges that said tax foreclosure judgment, sale and deed constitute a bar to this action, and alleges that plaintiff is estopped by said judgment, sale and deed from and ought not to be permitted to maintain this action."

On the filing of the answer, the respondent moved for judgment on the pleadings, which motion the court granted, rendering a judgment quieting the title of the respondent against the claims of the appellant, refusing, however, to award costs against her.

The appellant argues that, inasmuch as the judgment of foreclosure in the tax foreclosure proceedings was had upon a personal service, in an action in which she made default, it is conclusive of her rights in the property in question, and hence is *res judicata*, and a bar to any subsequent action against her relating to the property. A somewhat extended argument is made in support of the contention, but this we shall not attempt to follow. The vital objection to the contention is that it overlooks the fact that an

action to quiet title will lie against unfounded adverse claims as well as those founded upon the most perfect title. The answer of the appellant, it will be noticed, does not deny that she is making an adverse claim to the property; what she does say is that she claims no estate or interest "acquired since the tax foreclosure suit was commenced"—impliedly admitting that she does claim an estate and interest adverse to the respondent, although, perhaps, confined to estates or interests founded upon rights acquired prior to the foreclosure proceedings. Against these claims the action would lie. It may be that, had the appellant denied the allegations of the complaint and filed a complete disclaimer, she would have been entitled to go to proofs upon her denials, and to costs, and a dismissal of the action, had the respondent failed to establish his allegation that she had made adverse claims; but she is not entitled to such a judgment simply because the record shows that the adverse claims she did make are unfounded.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5063. Decided February 23, 1905.]

BART HEALY *et al.*, Appellants, v. KING COUNTY,

*Respondent.*¹

PLEADING—DEMURRER—WAIVER BY WITHDRAWING—OBJECTION TO ANY EVIDENCE. The objection that the complaint does not state a cause of action, first raised by demurrer, is waived by the withdrawal of the demurrer and answering on the merits, and cannot be subsequently raised by an objection to any evidence.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 10, 1903, upon dis-

¹Reported in 79 Pac. 624.

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Opinion Per Curiam.

missing an action, after sustaining an objection to any evidence on the ground that the complaint did not state a cause of action. Reversed.

Ballinger, Ronald & Battle and *A. J. Tennant*, for appellants.

W. T. Scott, John C. Murphy, and *D. C. Conover*, for respondent.

PER CURIAM.—The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. Upon the coming up of said demurrer for argument, the defendant, in open court, waived its demurrer, and took time to answer. The case having been called for trial and a jury duly impaneled and sworn, a witness was called on behalf of the plaintiff; whereupon the defendant objected to the introduction of any testimony on behalf of the plaintiff, on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The court sustained the objection, and, plaintiffs electing to stand upon their complaint, judgment of dismissal was entered, from which this appeal was taken.

The demurrer to the complaint having been waived, the sufficiency of the complaint could not be again called in question, under the rule announced in *Watson v. Town of Kent*, 35 Wash. 21, 76 Pac. 297. The judgment is therefore reversed, with instructions to overrule the objection to the introduction of testimony.

[No. 5311. Decided February 23, 1905.]

ELLA BARTO *et al.*, Appellants, v. EVAN R. DAVIS *et al.*,
Respondents.¹

ESTOPPEL—SETTLEMENT AND COMPROMISE—JUDGMENT—PAYMENT IN IGNORANCE OF EXECUTION SALE. Where judgment debtors make a settlement of a judgment in ignorance of the fact that an execution had been issued and their land sold thereunder to the judgment creditors, no sheriff's deed having been issued or certificate of sale recorded, and the judgment creditors are aware of such ignorance and know that the debtors suppose that the sum paid was for an assignment of the entire judgment, the judgment creditors are estopped from asserting any rights under the sheriff's deed thereafter issued, or from denying that the settlement included the entire judgment.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 9, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action of ejectment. Affirmed.

Tucker & Hyland, for appellants. The plaintiffs are charged with knowledge of the execution and sale. *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320; *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896. Silence alone is not sufficient to create the estoppel *in pais*. Bigelow, Estoppel (4th ed.), p. 575; *Kingman v. Graham*, 51 Wis. 232, 8 N. W. 181; *Brant v. Virginia Coal etc. Co.*, 93 U. S. 326. The plaintiffs did not exercise ordinary diligence. *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *Tacoma v. Tacoma Light etc. Co.*, 16 Wash. 288, 47 Pac. 738; *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379.

¹Reported in 79 Pac. 623.

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Winsor & McKay, for respondents. The defendants were estopped. *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Lynch v. Richter*, 10 Wash. 486, 39 Pac. 125; *Marines v. Goblet*, 31 S. C. 153, 9 S. E. 803, 17 Am. St. 22; *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572. The concealment of the execution sale was a fraud *per se*. *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148; *Brown v. Montgomery*, 20 N. Y. 287; *Knouff v. Thompson*, 16 Pa. St. 357; *Morris v. Herndon*, 113 N. C. 236, 18 S. E. 203; *Birch v. Steppler*, 11 Col. 400, 18 Pac. 530; *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934; *Kiefer v. Rogers*, 19 Minn. 32; *Staton v. Bryant*, 55 Miss. 261; *Wynne v. Mason*, 72 Miss. 424, 18 South. 422; *Olden v. Hendrick*, 100 Mo. 533, 13 S. W. 821.

RUDKIN, J.—On the 22d day of March, 1897, the plaintiffs in this action recovered a judgment against the defendants in the sum of \$110.79, before one of the justices of the peace of King county. On the same day a transcript of this judgment was filed with the clerk of the superior court of said county. On the 8th day of June, 1897, a writ of execution on said judgment was issued out of said superior court, and on the 16th day of July, 1897, the property in controversy in this action was sold under said execution, and bid in by the plaintiffs in this action, for the sum of \$50, the plaintiffs receiving a certificate of sale therefor.

Some time prior to September 19, 1899, Richard Winsor, representing the defendants, entered into negotiations with the plaintiffs with a view of settling and satisfying the above mentioned judgment; and, as a result of such negotiations, on said last mentioned date, the plaintiffs assigned the judgment to said Winsor, who was acting for the defendants; and, in consideration of such assignment, the plaintiffs were paid the sum of \$25. This

assignment was entered of record in the clerk's office, and satisfaction of the judgment was thereupon entered by Winsor as assignee. On the 16th day of September, 1902, the plaintiffs procured a sheriff's deed to the premises in controversy. At the time of the settlement and assignment of the judgment, as above mentioned, neither the defendants nor their attorney had notice that an execution had been issued on the judgment, out of the superior court, or that the premises in controversy had been sold thereunder, and had no such notice until about the time of the commencement of this action. The court below found that the plaintiffs had knowledge of the fact that Winsor was in ignorance of the sale in question, and made such settlement in entire ignorance of such sale, and that the plaintiff concealed the fact that such sale had been made, from said Winsor, at the time of said settlement, and we think this is a proper inference from the testimony.

At the time the property in controversy was sold under the execution, it was subject to a mortgage in the sum of about \$400, aside from delinquent taxes against it, and the equity above the mortgage and taxes was of little or no value. Counsel for plaintiffs did not consider it worth the price of a sheriff's deed. Some time after the sale, the property was deeded to the holder of the above mortgage as additional security. Thereafter the property was deeded back to defendants, the defendants paid off the mortgage, paid all delinquent and accruing taxes, and built a house on the property of the value of \$1,600, expending in all some twenty-two or twenty-three hundred dollars on the property. During all this time the defendants were in entire ignorance of the sale in question, and the plaintiffs were concealing from them the fact of such sale. The certificate of sale was never recorded, and the sheriff's deed was not issued until some five years after the sale. During all these years the defendants were in

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possession of the property in dispute, paying the taxes and making valuable and lasting improvements thereon.

The plaintiffs brought an action of ejectment to recover possession of the property, and also to recover the rents and profits, amounting to the sum of \$500. The answer of the defendants denied the material allegations of the complaint, and alleged affirmatively substantially the matters herein set forth. The case was tried by the court without a jury, findings of fact and conclusions of law were filed, and, from the judgment entered thereon in favor of the defendants, this appeal is taken.

The court found that, at the time the settlement of the judgment in the justice's court was made, and the judgment assigned to Winsor, and the money paid on account of the assignment, the defendants and their attorney were ignorant of the sheriff's sale, and supposed, in good faith, that the settlement covered and included the entire judgment of \$110; that the plaintiffs knew that the defendants and their attorney were laboring under this mistake, but concealed all knowledge of the sheriff's sale from them, and made the assignment of the judgment, and accepted the money therefor, with full knowledge that the plaintiffs supposed that the payment was made in satisfaction of the entire judgment. As stated heretofore, we think this finding is a proper deduction from the testimony and the acts and conduct of the parties. Under such circumstances, the plaintiffs are bound by the settlement made, and should be estopped to deny that the settlement included the entire judgment, or to set up any rights under the sheriff's deed. As said by this court in *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572:

"When the appellant, after the settlement, without the notice or knowledge of respondent, took further steps in the action which had been settled, and thereby obtained the legal title to the lands, this course was certainly contrary

to what appellant, both by his conduct and statements, had led respondent to believe would be taken, and was in fraud of respondent's rights."

Inasmuch as we are of opinion that the plaintiffs are estopped to deny that the settlement, made on the 19th day of September, 1899, included the judgment of the justice of the peace, and all rights growing out of such judgment, including the rights, if any, acquired by the sheriff's sale, we deem it unnecessary to decide whether the plaintiffs are estopped by the fraudulent concealment of their claim to the property, during the succeeding years while the defendants were redeeming the premises from taxes and mortgages, and making valuable improvements thereon, in good faith and in entire ignorance of the plaintiffs' secret claim thereto.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 4928. Decided February 23, 1905.]

THE CITY OF ABERDEEN, *Respondent*, v. M. E. LUCAS
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—OBJECTIONS—WAIVER. Objections going to the regularity of local improvement assessments must be first presented to the city council or they are waived.

SAME—WAIVER BY PETITIONING FOR IMPROVEMENT. One who petitions for local improvements cannot question the validity of the assessment unless the city council never had jurisdiction or so far departed from established methods as to lose jurisdiction.

¹Reported in 79 Pac. 632.

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Citations of Counsel.

SAME—NOTICE—SUFFICIENCY—WHAT ORDINANCE GOVERNS. The twenty day notice to abutting owners of local improvement assessments provided for by a general ordinance contemplated by Laws 1890, need not be given where the assessment was made under Laws 1893, p. 171, and it is not questioned that the notice there provided for and given constituted due process of law.

Appeal from a judgment of the superior court for Chelalis county, Rice, J., entered June 13, 1903, after a trial on the merits before the court without a jury, foreclosing a local improvement assessment. Affirmed.

John C. Hogan, for appellants, contended, among other things, that the notice was insufficient to confer jurisdiction. *Cooley*, Taxation, 265, 266; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gatch v. Des Moines*, 63 Iowa 718, 18 N. W. 310; *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *Everett Water Co. v. Fleming*, 26 Wash. 364, 67 Pac. 82. Petitioners are not estopped by illegal proceedings. *Steckert v. East Saginaw*, 22 Mich. 104; *Taylor v. Burnap*, 39 Mich. 739; *Howell v. Tacoma*, 3 Wash. 711, 29 Pac. 447, 28 Am. St. 83; *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874; *New Whatcom v. Bellingham Bay Imp. Co.*, 10 Wash. 378, 38 Pac. 1024. There is no estoppel as to jurisdictional matters. *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353. It was incumbent on the city to show that every necessary step was taken. *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002; *Pittsburg v. Walter*, 69 Pa. St. 365; *Myrick v. La Crosse*, 17 Wis. 456; *Kneeland v. Milwaukee*, 18 Wis. 431. Injunction lies to restrain the collection of the assessment. *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac.

441; *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077; *Dillon, Mun. Corp.*, 863; *High, Injunctions*, 639.

E. H. Fox, for respondent.

FULLERTON, J.—On December 27, 1899, the appellants were the owners of real property, situated in the city of Aberdeen, which was not readily accessible because of the unimproved condition of the street upon which the property abutted; and on that day they, together with others similarly situated, petitioned the city council of that city to improve such street, at the cost of the property to be benefited, by constructing thereon a plank roadway, from the main street of the city to a point beyond their property. The city council acted upon the petition, taking such steps as finally resulted in the construction of the plank roadway, and the assessment of the cost thereof to the property deemed to be benefited thereby. The assessment against the appellants' property amounted to \$90.35, which they refused to pay, and this action was brought to foreclose the assessment lien.

The appellants raised numerous objections to the assessment proceedings, but as these, with one exception, go rather to the regularity of the proceedings than to the jurisdiction of the city council to make the assessment, it is sufficient to say that they are not matters that can be urged as a defense to the foreclosure action, but, to have availed the appellant, they must have been taken before that body, and an appeal taken therefrom. *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686. Moreover, the appellants, having petitioned for the improvement, are estopped from now questioning the validity of the proceedings or the assessment, unless it be that the city council never had any jurisdiction of the proceedings, or so far departed from established methods as to oust it of jurisdiction. *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874.

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Opinion Per FULLERTON, J.

By a general ordinance, enacted by the city council of the city of Aberdeen, relating to assessments for street improvements, it was provided that notice of the hearing, on the confirmation of the report of the officers appointed to apportion the assessment, should be given by publication, the first publication of which notice should be at least twenty days before the time fixed for the hearing. The first publication of the notice of the hearing in this instance was less than twenty days from the date of hearing, and the appellants contend that the notice is jurisdictional, and that the failure to give the required notice worked a loss of jurisdiction in the city council to confirm the assessment. It may be that if the ordinance on which the appellants rely was still in force, and governed the procedure for making the street improvement, that their contention should be given effect, and this assessment held unenforceable. But this ordinance was passed under the statute of 1890, which evidently contemplated a general ordinance on the part of municipalities under which all street improvements were to be made, and to which all proceedings should conform.

The legislature of 1893, however, enacted a new law on the subject. Laws 1893, p. 159. By that law each improvement required a separate ordinance, to which the proceedings must conform, and such was the method pursued in making this assessment. The prior ordinance was, therefore, of no binding force, and a compliance therewith was not necessary in order to make a valid assessment. It is not questioned that the notice provided for and given was sufficient to constitute due process of law, and it must be held sufficient to confer jurisdiction on the city council to make the assessment.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5029. Decided February 23, 1905.]

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JAMES MCKAY, *Respondent*, v. DAVID CALDERWOOD,
Appellant.¹

PLEADINGS—COMPLAINT—DEMURRER—LAW OR EQUITY. A demurrer to a complaint asking equitable relief, for want of facts to state a cause in equity, is properly overruled if the complaint states a cause of action upon any theory.

SPECIFIC PERFORMANCE—COMPLAINT—SUFFICIENCY—VENDOR AND PURCHASER—FRAUDS, STATUTE OF—PART PERFORMANCE OF ORAL SALE. A complaint for the specific performance of an oral sale of land states a good cause of action in equity where it is alleged that plaintiff entered into the possession of land under an agreement for a half interest, paid part of the purchase price by discharging outstanding claims, expended labor thereon for a term of years, adding valuable improvements thereto, paid out money to release obligations against the land, and tendered the balance of the purchase price, since the elements of a constructive fraud are present in such part performance; and especially where it is alleged that the defendant is insolvent, since the plaintiff could not be replaced in his original position or adequately compensated in damages.

FRAUDS, STATUTE OF—VENDOR AND PURCHASER—PART PERFORMANCE OF ORAL SALE—POSSESSION. The taking of a joint or divided possession, under an oral contract for the sale of an undivided one half interest in lands, is a sufficient part performance to take the same out of the operation of the statute of frauds, when coupled with payment of the purchase price, or the making of valuable improvements; nor is possession always a necessary element of part performance.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered August 11, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing the specific performance of a contract for the sale of land. Affirmed.

E. S. Avey and Israel & Mackay, for appellant.

W. H. Abel, for respondent.

¹Reported in 79 Pac. 629.

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Opinion Per DUNBAR, J.

DUNBAR, J.—An action to enforce specific performance for the sale of land, based upon an oral contract. The complaint, omitting the formal part, is as follows:

“(1) That on or about November 26th, 1900, the defendant was the owner of the following described real estate situate in Chehalis county, Washington: [Description.] That on said date the plaintiff and defendant entered into an agreement by parol, wherein and whereby it was mutually agreed that plaintiff should enter into possession of said premises jointly with the defendant, and should have and own an undivided one-half interest therein, and be the owner in fee simple of such interest, which interest the defendant agreed to convey to plaintiff in consideration of the payment to the defendant of the sum of \$1,000, and the further payment of the sum of \$500, or such amount as was then due or thereafter due upon a certain mortgage upon said premises in said sum of \$500 and interest, then owned by one Palmer; and as a part consideration the plaintiff was to, and he agreed to, satisfy and discharge, and he did satisfy and discharge, all outstanding claims and obligations owing to him by said Calderwood. That said outstanding claims and obligations were owing by said Calderwood to this plaintiff, on account of work and labor performed by plaintiff, at defendant's instance and request, upon the said land; that said labor consisted in clearing about eight acres of said land, and cutting the timber upon about twelve acres of said land, and assisting defendant in grubbing about three acres of said land; that said work was performed from time to time during the period of five years next prior to said agreement, and the reasonable value of said services was and is the sum of \$650.

“(2) That thereafter, pursuant to said agreement, this plaintiff entered into the possession of said lands jointly with the defendant, and ever since has been and still is in possession of said lands, under said agreement, as the owner of an undivided one-half interest; that, after entering into the possession of said lands, this plaintiff, with the knowledge and consent of the defendant, made numerous valu-

able permanent improvements upon the said lands; that, at the time of entering into said contract, said lands consisted mainly of unenclosed wild lands, covered with timber and underbrush, and that the same was of no value for agricultural purposes; that, upon making said contract and prior thereto, this plaintiff commenced to and ever since has cleared, cultivated and reduced said lands to cultivation and has greatly increased the amount of land in cultivation on said premises; that the value of his said improvements is the sum of \$1,085; that he has never been paid any sum whatsoever for said improvements.

"(3) That thereafter, and on or about February 1st, 1902, it was mutually agreed that the said \$500 mortgage, with interest due, should be taken up and said Calderwood execute a new mortgage upon said lands to one Malone for the amount due on said other mortgage, payable one year after date, and that said plaintiff should pay said mortgage at or before maturity, and it was further agreed between these parties that said \$1,000 should be paid at such time as defendant desired, and that he should be allowed interest on the said \$1,000, from the date of the original agreement at the rate of 6 per cent per annum; that in pursuance of said agreements the plaintiff, prior to the commencement of this action, fully paid the said Malone mortgage, the amount paid by him being the sum of \$594.

"(4) That, at all times since the making of said agreements, this plaintiff has been ready, willing and able to pay the said sum of \$1,000, with said interest; that, prior to the commencement of this action, this plaintiff tendered to the defendant said sum of \$1,000, with interest at 6 per cent per annum from the date of said original agreement, and tendered to the defendant the said Malone note and mortgage, paid by plaintiff as aforesaid, and demanded of the defendant that he execute to plaintiff a deed, conveying to plaintiff an undivided one-half interest in the lands above described; that said defendant refused said tender and refused to execute said deed, and then and still does refuse to comply with said contract upon his part; that at

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all times since the entering into said original contract this plaintiff has paid more than one-half of the taxes assessed against said lands.

"(5) That the defendant and the plaintiff are each single men; that the defendant has no other property or means of value, and a judgment against him could not be collected by process of law, unless the lands above described are subjected to the payment thereof; that the plaintiff has no plain, speedy or adequate remedy at law; that plaintiff is ready, willing and able to perform all the obligations of said contract upon his part, and herewith tenders his willingness to perform any lawful conditions adjudged by the court to be performed by him.

"Wherefore plaintiff prays judgment that the contract between these parties be established and adjudged valid, and that the defendant be required to execute proper conveyance, conveying to this plaintiff an undivided one-half interest in said lands, according to the terms of the said contract, and that this plaintiff be adjudged to be the full equitable owner of such an undivided one-half interest, and that defendant be required to accept said tenders, and fully perform said contract in all respects, and for such other and further relief as to the court may seem equitable, including costs."

The defendant demurred to the complaint upon the ground that it failed to state a cause of action. This demurrer was overruled by the court; whereupon appellant answered, by both denial and affirmative allegation; and, respondent having replied, the cause went to trial, findings of fact were made by the court, the issues were decided in favor of the plaintiff, and judgment was entered substantially in compliance with the prayer of the complaint. From such judgment this appeal is taken.

It is the contention of the appellant that the trial court should have sustained the appellant's demurrer to the complaint; that the pleadings sought to set forth facts which, under our practice, were not sufficient to invoke the equity

jurisdiction of the court, and that the petition should have been dismissed. The complaint in this action could not have been dismissed, in any event, under the uniform rulings of this court, there having been a cause of action stated in the complaint, even though the complaint did not set forth facts to warrant equitable interference on the part of the court. We have frequently decided, in principle, that, under the provisions of the code, litigants cannot be expelled from the court at one door under the burden of accumulated costs, with the admonition to enter the court at another door with another accumulation of costs; but that, whatever rights the plaintiff has under the complaint, conceding its allegations to be true, will be tried out by the court, and the proper judgment in the cause rendered. But we think unhesitatingly that this complaint states a cause of action in equity. It is true that it is an attempt to enforce specific performance of a contract which is void in law, through the equitable doctrine of part performance. It is also true, as is stated by Judge Pomeroy in his work on Contracts, as quoted on page 21 of appellant's brief, that:

"In every case where the doctrine of part performance has been applied, the elements of a constructive fraud will be found to exist, and in the absence of these elements equity always refuses to interfere. There must be acts of such a nature that the plaintiff cannot be replaced in his original position or adequately compensated in damages."

In short, it may be conceded that, where part performance is relied upon to take a parol agreement for the sale of land out of the statute of frauds, the burden is imposed upon the party pleading the part performance to show acts unequivocally referring to, and resulting from, that agreement—acts such as would not have been done unless with a direct view to the performance of that very agreement. But, testing the complaint by these rules, we think it is

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Opinion Per DUNBAR, J.

sufficient. Certainly the element of a constructive fraud is found in the allegations of the complaint. The plaintiff, under a fair agreement, entered into the possession of the land, expended his labor thereon for a term of years, paid out his money for the purpose of releasing obligations against the land; and, if the allegation of the complaint is true that a judgment against the defendant could not be collected by process of law, then the other condition mentioned by the learned author above quoted obtains, because the plaintiff cannot be replaced in his original position, or adequately compensated in damages.

It is contended by the appellant that the possession shown in this case was not sufficient possession to justify the interference of a court of equity, or to constitute a part performance of the contract, sufficient to relieve the contract from the operation of the statute of frauds. Possession, under the authorities, is not always a necessary element to constitute part performance. The rule is laid down by Mr. Pomeroy, in § 117, as follows:

"It has been said, in some judicial decisions, that possession is an indispensable element in the part performance of a verbal contract for the sale of land—in other words, that the part performance of such a contract is impossible without a change of possession; but this conclusion is clearly incorrect. Many other acts, without a possession, fully satisfy all the requisites of a part performance. It is not essential that the contract should expressly stipulate for the delivery of possession. If the possession is taken in pursuance and execution of the agreement and with the knowledge of the vendor, it is a good part performance, although the contract be silent in respect to it. As possession alone is sufficient, *a fortiori*, possession delivered by the vendor, or taken with his knowledge and consent, when accompanied by other acts on the part of the plaintiff, constitutes a part performance of the most effectual and conclusive character; as possession and payment of the pur-

chase-price in whole or in part; or possession and the making of valuable improvements on the land."

The same author, in § 126, in speaking of another branch of this case which is involved in the allegation of improvements having been made upon the land by the plaintiff, says:

"The making of valuable improvements on the land by a vendee or lessee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell and convey, or to lease, is taken out of the statute. It is very plain that such proceedings satisfy the equitable principle upon which the doctrine of part performance rests, much more completely than a mere possession does."

And the universal rule is that possession and the making of permanent improvements is sufficient to invoke equitable aid. Neither is there anything in appellant's contention that the possession alleged in the complaint was not a sufficient possession because it was a joint possession, and the authorities cited are not at all in point. Of course, the vendee, under a parol contract calling for the entire fee, may not rely upon a joint possession, or a divided possession; but in this case the contract was only for an undivided interest in the real estate, and no authorities, we think, would hold the vendee to a possession which was absolutely unqualified and undivided, and which he would not have a right to under his contract.

We think there was a sufficient demand, as shown by the whole record, and, upon the questions of fact, a perusal of the record satisfies us that the facts found by the court were justified by the testimony, and that the judgment properly followed such findings of fact. It is therefore affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took on part.

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Opinion Per Curiam.

| 37 201 |
| 142 430 |

[No. 4970. Decided February 23, 1905.]

JOHN P. HENDERSON, *Respondent*, v. PIERCE COUNTY
et al., *Appellants*.¹

TAXATION—EXCESSIVE LEVY—POWER OF COURTS TO REDUCE. Where it appears that the plaintiff's property was not only assessed at a gross overvaluation many times its value, but higher proportionally than other property, the trial court properly set the assessment aside as excessive, and reduced the amount to a just sum.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 26, 1903, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, reducing an assessment for taxes. Affirmed.

F. Campbell, for appellants.

John C. Stallcup, for respondent.

PER CURIAM.—The respondent brought this action to cancel, and have held for naught, certain taxes, levied and assessed against his property by the county of Pierce, which he alleges are fraudulent and void, because based upon valuation grossly in excess of the actual value of the property and in excess of the valuations of property of like kind owned by other persons, and situated in that county. The complaint sets out in great detail the facts constituting the claimed discriminations and overvaluations, and is conceded to be sufficient under the rule announced by this court in the cases of *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553, and *Miller v. Pierce County*, 28 Wash. 110, 68 Pac. 358. Issue was taken on the allegations of the complaint, and a trial had, which resulted in a judgment, cancelling the taxes levied on pay-

¹Reported in 79 Pac. 617.

ment of a sum determined by the court to be a just and legal amount to be paid as taxes on the property. The county appeals and assigns as error that the evidence is insufficient to sustain the judgment.

In *Templeton v. Pierce County*, *supra*, we held that it was no ground for relief against excessive valuation of property that the assessor had merely overvalued the property, if it appeared that his action was not arbitrary or capricious, and the property had been assessed in the same proportion as other like property within the jurisdiction of the assessing officer, and we held in that case that the evidence did not show any cause for declaring the assessment illegal. The appellant invokes the principle here, but we think the evidence much stronger in this case than in the one cited. The evidence here shows not only a gross overvaluation of the respondent's property, but it shows a gross overvaluation, we think, when compared with other property of like kind within the assessor's jurisdiction. Of course, slight or even considerable differences in valuations are not sufficient, when honestly made, to authorize the court to set aside an assessment. Where, however, the assessment is many times the actual value of the land, and is higher proportionally than other property, a condition does arise when the courts are authorized to do so. *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563; *Benn v. Chchalis County*, 11 Wash. 134, 39 Pac. 365; *Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346; *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480.

The judgment appealed from will stand affirmed.

Feb. 1905.] Opinion Per RUDKIN, J.

[No. 5418. Decided February 23, 1905.]

CASCADE BOOM COMPANY, *Appellant*, v. MCNEELEY
LOGGING COMPANY, *Respondent*.¹

LOGS AND LOGGING—LIEN FOR BOOMAGE CHARGES—EVIDENCE OF AGREEMENT FOR—SUFFICIENCY. Where a boom company's boom was broken, and it was hung by a logging company, whose logs were thereupon caught therein, findings that there was no request or contract to catch and hold the logs and consequently no lien for the boomage charges, are sustained where there was evidence that the president of the boom company gave the manager of the logging company permission to hang and use the boom without charge, and the fact that the president was without authority so to do is immaterial since there was no request or contract for boomage services.

SAME—FAILURE OF LIEN—RENTAL VALUE OF BOOM USED—PLEADING AND PROOF. In an action to foreclose a lien on logs for boomage charges, where it appears that the boom company performed no services, but its boom was hung and used by defendant, there can be no recovery for the rental value of the boom, upon plaintiff's failure to establish the lien, when there is nothing in the complaint on which to base such claim, and no evidence to show such rental value.

Appeal from a judgment of the superior court for King county, Bell, J., entered March 1, 1904, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to foreclose a lien on logs. Affirmed.

Corliss & Paull, for appellant.

Charles O. Bates and *John H. McDaniels*, for respondent.

RUDKIN, J.—The plaintiff is a corporation, organized to build booms and to catch logs and timber products therein, under the act of March 17, 1890, and has filed in the

¹Reported in 79 Pac. 793.

office of the secretary of state a plat or survey, as required by § 2 of said act. The defendant is a corporation engaged in the logging business. In the spring of 1902, the plaintiff constructed a boom across the Snoqualmie river above the falls. This boom consisted of six or seven boom sticks, from sixty to eighty feet in length, which were coupled together with chains, and the ends of the boom sticks were fastened to trees on the banks of the river, to hold the boom in place. In the fall of the year 1902, this boom broke, and swung along the bank of the river, where it remained until the month of May, 1903. Some time in the latter month, the manager of the defendant corporation had a conversation with the president of the plaintiff corporation, and, as a result of that conversation, the defendant replaced the boom across the river, in which position it remained until the month of October, 1903. During that time the boom caught and held some five million feet of logs belonging to the defendant. A lien was filed against these logs by the plaintiff, for labor performed and assistance rendered in securing the same. This action was brought to foreclose this lien. The defendant had judgment below, and from such judgment the plaintiff appeals.

The case turns entirely upon questions of fact. The conversation between the president of the appellant corporation and the manager of the respondent corporation, in relation to the use of the boom, was rather indefinite, and there was a conflict in the testimony as to the language used. The witness Scott, president of the plaintiff corporation, testified in relation to this conversation as follows:

"Mr. Wilcox says, 'Frank,' he says, 'how about that boom?' I says, 'Do you want it hung?' 'Well,' he says, 'yes.' 'Well,' I says, 'go and hang it.' I says, 'I am pretty busy; you have got lots of time; you go and hang it if you want it.' He says, 'All right,' he would. About ten days, I think, after that, he hung it."

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Opinion Per RUDKIN, J.

The witness Wilcox, manager of the defendant corporation, related the conversation as follows:

"I met Mr. Scott in Snoqualmie, and I asked him what he was going to do with his boom that year. He said he was not going to do anything with it. I asked him what he would charge me to let me swing the boom and catch our logs, and he hesitated, and he says, 'I won't charge you anything;' he says, 'If you want to swing it, go ahead and swing it.' He says, 'You can't hurt those boom sticks.' That was his very words. And I told him all right, I would take him up on it. And so it might have been a week or ten days, or such a matter, and I had the boom strung."

The latter witness was corroborated, in a measure, by the witness McNatt. This testimony utterly fails to show that the appellant caught and held the logs of the respondent at its request, as alleged in the complaint and lien notice, or as required by the statute. The utmost it tends to show is that the respondent took charge of and used the appellant's boom, and thus rendered itself liable for the reasonable rental value thereof. The appellant claimed in argument that it should be allowed a recovery for such rental value at least. There are several objections to such a recovery in this action. There is no basis for such recovery in the complaint. There is no testimony from which this court could determine such rental value, and no lien would attach to the logs to secure its payment. We do not desire to be understood as holding that there was in fact any liability for the rental value in this case, as that question is not properly before us.

The appellant questions the authority of its president to grant the use of its boom free of charge; but, assuming that the president had no such authority, it would not avail the appellant in this case. If the president had no authority to act for or bind the appellant, then there was no request, and no agreement, express or implied, and we

would simply have a case where the respondent took charge of and used the appellant's boom. For reasons already stated, there can be no recovery for such use in this case.

In any event, the judgment appealed from is right, and the same is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

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140 570

[No. 4964. Decided February 25, 1905.]

M. R. ALBRECHT *et al.*, Respondents, v. EDWARD CUDIHEE,
*Appellant.*¹

FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—STATUTES—CONSTRUCTION. Laws 1901, p. 222, regulating the sale of "any stock of goods, wares or merchandise in bulk," does not apply to a cash register used in a saloon business to keep the accounts, and not for sale, but which was sold with the stock, fixtures and business, since the statute was intended to cover only the goods belonging to the mercantile stock or supply kept for sale.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 17, 1903, in favor of the plaintiff, in an action of replevin, after a trial before the court without a jury, upon stipulated facts. Affirmed.

Roberts & Leehey, for appellant, cited: 14 Am. & Eng. Ency. Law, pp. 1079-1084; *St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 33 N. E. 113; *Van Evera v. Davis*, 51 Iowa 637, 2 N. W. 509; *Arnett v. Trimmer*, 43 N. J. Eq. 488, 11 Atl. 487; *Kern v. Wilson*, 73 Iowa 490, 35 N. W. 594.

Wright & Kelleher, for respondents, cited: *Van Patten*

¹Reported in 79 Pac. 628.

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v. Leonard, 55 Iowa 520, 8 N. W. 334; *Curtis v. Phillips*, 5 Mich. 112; *Kent v. Liverpool etc. Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463; *Knight v. Parker*, 25 Ill. 593; *Jones, Chattel Mortgages*, § 62; *Van Evera v. Davis*, 51 Iowa 637, 2 N. W. 509; *In re Eldridge*, 8 Fed. Cases 412, No. 4,330.

HADLEY, J.—The controversy here hinges upon the construction of the so-called “sales in bulk statute,” as found in chapter 109, session laws of 1901, p. 222. Prior to April 17, 1902, Harkins & Webb, copartners, were the owners of a saloon in Seattle, and were engaged in selling liquors and cigars at retail. On said day they sold their saloon to respondents, together with the entire stock of liquors and cigars; also, all barroom fixtures, chairs, tables, tools, and utensils, including a cash register. Respondents immediately took possession of said property, and engaged in the saloon business at the same place. They did not require their aforesaid vendors to execute and deliver to them the affidavit required by the statute aforesaid, as to the names of the vendors’ creditors, and the amounts due them. No part of the purchase money was, by respondents, applied upon payment of the vendors’ debts, except a mortgage upon the stock.

At the time of the sale, the vendors were indebted to the Queen City Cigar Company, and thereafter the latter obtained a judgment against them for \$77.51. Thereupon execution was issued upon said judgment, and placed in the hands of the sheriff of King county for levy. He proceeded to levy upon the aforesaid cash register in the possession of respondents, and took it into his possession by virtue of said execution. Respondents then brought this suit for possession of the cash register. The cause was tried by the court on stipulated facts. In addition to the foregoing, it was stipulated that the cash register was

worth \$225, and was used by said vendors in making up and keeping their cash; also, that it was not a part of the goods, wares and merchandise kept for sale in said saloon, but was kept and used only for the purpose aforesaid. Judgment was entered awarding the possession to respondents, and the sheriff has appealed.

The single question in the case is, was the cash register such a part of the goods sold in bulk as brings it within the provisions of the statute cited? Under the stipulation as to the facts, it was not a part of the goods kept for sale. The statute repeatedly refers to the goods which it is intended to reach as "stock of goods, wares or merchandise." The common use of the term "stock," when applied to the goods in a mercantile house refers to those which are kept for sale. In *Curtis v. Phillips*, 5 Mich. 112, a chattel mortgage given by a merchant upon "goods in the store" was held not to include a safe kept in the store, but which was not for sale. It will be observed that the term "goods in the store" is much more comprehensive than the words used in this statute. Substantially equivalent words are used in the statute, but are limited by the term "stock." A cash register bears a similar classification in its relation to merchandise as a safe, and if such property is not a part of "goods in the store," it is not a part of "stock of goods, wares or merchandise" in the store. The cited case seems to be directly in point. Other cases bearing similarly upon the point are, *Van Patten v. Leonard*, 55 Iowa 520, 8 N. W. 334; *Kent v. Liverpool etc. Ins. Co.*, 26 Ind. 294 89 Am. Dec. 463.

We think the legislature intended the provisions of the statute to apply only to goods belonging to the mercantile stock or supply which is kept for sale. The cash register not being such property, the judgment of the trial court was right, and it is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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Opinion Per RUDKIN, J.

[No. 5475. Decided February 25, 1905.]

M. A. REDDING, *Respondent*, v. JOHN ANDERSON,
Appellant.¹

PARTNERSHIP—RECEIVERS—APPOINTMENT. In an action between partners, it is proper to appoint a receiver to take charge of the concern pending the suit, where the preponderance of the evidence establishes the existence of the partnership, which is denied by the defendant, who wrongfully excludes the plaintiff from participating in the management of the firm business, and it is apparent that a dissolution must ultimately be decreed.

Appeal from an order of the superior court for King county, Bell, J., entered August 12, 1904, appointing a temporary receiver, after a hearing upon affidavits, in an action to wind up a partnership. Affirmed.

A. A. Anderson and Tucker & Hyland, for appellant.

Allen, Allen & Stratton, for respondent.

RUDKIN, J.—This was an action for the dissolution of a partnership, and for the appointment of a receiver to wind up its affairs. The complaint alleges, in substance, that the plaintiff and the defendant entered into a copartnership, on or about the 14th day of November, 1903, for the purpose of operating and conducting a sawmill and lumber business, in King county, Washington, under the firm name and style of "The North Star Lumber Company," sometimes called "Anderson & Redding;" that the parties have been engaged in the conduct and management of such business up to the time of the commencement of this action; that notwithstanding said partnership agreement, the defendant refuses to permit the plaintiff to have any voice in the management of the affairs of the partnership, refuses him access to the books and accounts of

¹Reported in 79 Pac. 628.

the firm, and refuses to render any account of the partnership affairs or business; that the disagreement of the parties, and the conduct of the defendant, are such that the partnership business can no longer be continued; that the firm property consists of a sawmill and book accounts of the value of \$6,000, and the firm indebtedness is from \$500 to \$1,000; that the defendant is insolvent, and has no property subject to execution other than his interest in the partnership property, and that unless a receiver is appointed the firm property will be dissipated and lost to the plaintiff, etc. The answer is, in substance, a general denial.

Upon the filing of the complaint, an order was made directing the defendant to appear and show cause why a receiver should not be appointed to take charge of the firm property pending the action, and until the further order of the court. A hearing was had upon affidavits, and the court granted the prayer of the complaint, and appointed a receiver. From this order the defendant appeals to this court.

Two questions are discussed in the briefs of counsel: first, is the testimony sufficient to establish the existence of the partnership? and, second, should a receiver be appointed?

(1) A great many affidavits were presented at the hearing, mostly by the respondent. It would serve no useful purpose to set forth these affidavits, either at length or in substance. We deem it sufficient to say that the existence of the partnership as alleged in the complaint was established by a great preponderance of the testimony.

(2) There is as little room for doubt on the second point. The appellant denies the existence of the partnership, has assumed the entire management and control of the partnership business, and has wrongfully excluded the respondent from all participation therein.

“In an action between partners, where fraudulent con-

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Syllabus.

duct is alleged, and where a partner has been wrongfully excluded from participating in the management of the firm's business, and the like, and where, from the nature of the partnership agreement, it is apparent that a dissolution must ultimately be decreed, a court of equity will unhesitatingly appoint a receiver." *Cole v. Price*, 22 Wash. 18, 60 Pac. 153, and cases cited.

"In actions for the dissolution of partnerships, and the winding up of their affairs, the fact that one partner has excluded the other from participation in the profits of the business, or from his share in its management and control, has always been regarded as one of the strongest grounds for equitable relief by the appointment of a receiver." *High, Receivers* (3d ed.), § 522, *et seq.*

There is no error in the record, and the order is affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 4999. Decided February 25, 1905.]

INVESTMENT SECURITIES COMPANY, *Appellant*, v. PHOEBE
D. ADAMS *et al.*, *Respondents*.¹

MORTGAGES—LIMITATION OF ACTIONS—MORTGAGEE IN POSSESSION. The statute of limitations does not run against the right of foreclosure as against a mortgagee in possession.

SAME—POSSESSION UNDER A VOID FORECLOSURE—PURCHASER AS ASSIGNEE. A mortgagee, who after default takes possession in good faith under a void foreclosure, holds as a mortgagee in possession regardless of the consent of the mortgagor, and a purchaser at such a void sale becomes the assignee of the mortgage.

SAME—VOID FORECLOSURE—RELIEF AGAINST MISTAKE—VACATING VOID DECREE—BRINGING IN NEW PARTIES. Where children of a deceased mortgagor were not made parties to the foreclosure

¹Reported in 79 Pac. 625.

37	211
37	351
37	211
41	529
37	211
42	461

action because unknown to the plaintiff, who in good faith took possession supposing that the full title was conveyed by the foreclosure sale, the mistake calls for equitable relief, and the proper course is to vacate the decree, allow the plaintiff to file an amended petition, and foreclose against the interest of the children.

SAME—EQUITY—ACCOUNTING—PAYMENT OF MORTGAGE DEBT. Where a void foreclosure decree is vacated at the instance of the plaintiff in order to bring in, as necessary parties, the children of a deceased mortgagor, who own a half interest in the property, the children are not entitled to plead the bar of the statute while the mortgagee was in possession, or to an equitable accounting for rents and profits, until they first do equity by paying the mortgage debt.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 1, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, denying plaintiff's right to foreclose a mortgage as to an undivided half interest in the property. Reversed.

Hamblen, Lund & Gilbert, for appellant.

Hartson & Holloway, for respondents, to the point that, to constitute one a mortgagee in possession, there must be consent by the mortgagor, cited: *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. 613; *Brundage v. Home Sav. etc. Asso.*, 11 Wash. 277, 39 Pac. 666; *State ex rel. Montgomery v. Superior Court*, 21 Wash. 564, 58 Pac. 1065; *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715; *DeLashmutt v. Sellwood*, 10 Ore. 319; *McClory v. Ricks*, 11 N. D. 38, 88 N. W. 1042; *Bowen v. Brogan*, 119 Mich. 218, 77 N. W. 942, 75 Am. St. 387.

HADLEY, J.—In 1890 one James M. Adams and Phoebe D. Adams, his wife, executed their promissory notes, and mortgage securing the same, to the Jarvis-Conklin Mortgage Trust Company. Said James M. Adams afterwards died, and Phoebe D. Adams, his widow, became the ad-

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ministratrix of his estate. The said mortgagee also assigned the mortgage to the Investment Securities Company, and, upon default in payment, the latter brought this suit, in 1897, to foreclose the mortgage. Phoebe D. Adams, in her own right and also as administratrix, was made a party defendant. Decree of foreclosure was entered, and the property mortgaged was ordered sold to satisfy the judgment. At sheriff's sale, in pursuance of such order, the said plaintiff bid in the property, and the sale was thereafter duly confirmed; whereupon the plaintiff entered into possession of the mortgaged premises. This was followed by a deed from the sheriff to the North American Trust Company, the assignee and successor in interest of the plaintiff, who also entered into possession, and has since retained, and now holds, peaceable possession of the premises.

The mortgaged land was the community property of the said Phoebe D. Adams and of her said deceased husband. The husband died intestate, and left surviving him, as his heirs at law, Harry M. Adams, a son, and Edith D. Adams and Lelah M. Adams, daughters, all children of the deceased and of his said wife Phoebe D. Adams. Said children were not made parties to the foreclosure suit. The foreclosure and sale occurred in 1897, and possession of the premises continued, as aforesaid, until 1902, when the said plaintiff, joined by its said assignee, filed a petition in the foreclosure cause, asking that the decree theretofore rendered be set aside, and all proceedings cancelled; also, asking leave to file an amended complaint, joining the said children of the mortgagors as parties defendant.

The petition alleges that, at the time of bringing the suit in 1897, the plaintiff was not aware of the existence of said children, and believed that said Phoebe D. Adams was the sole heir of the deceased, James M. Adams; that, when it purchased the property at sheriff's sale, the plain-

tiff believed that it would receive the whole of the premises, and the bid was made upon that assumption; that the said North American Trust Company believed the same, when it accepted the assignment of the certificate of sale from the plaintiff, and when it afterwards accepted the sheriff's deed; that the petitioners first obtained knowledge of the existence of said children in June, 1902, and that they immediately employed counsel to prepare and file their petition for relief as aforesaid.

On the written stipulation of counsel for the petitioners, and also for Phoebe D. Adams, the said petition was granted. Such an amended complaint was thereafter filed, alleging substantially the above facts; also, showing the amount of rents collected and taxes and expenses paid during the period of possession held by the said plaintiff and its assignee. The said children of the mortgagors answered the amended complaint, and alleged, that, ever since the death of their father, they have been the owners in fee simple, and entitled to the possession, of an undivided half interest in said mortgaged land; that the plaintiff entered into possession without right, and without consent of said defendants, has collected the rents and profits, and has failed to account therefor. Prayer is made for an accounting as to one-half the rents and profits, and also for a decree that said defendants are the owners of an undivided half of said land, free and clear of any claim of plaintiff, and also declaring that the plaintiff's cause of action, as set forth in the amended complaint, is barred as to said defendants.

The cause was tried under the amended complaint and answer thereto, and resulted in a decree of foreclosure, as against Phoebe D. Adams and an undivided half of the mortgaged land, but sustaining the contention of the defendants, the children of the mortgagors, and awarding to them the ownership of the other undivided half of the

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property, free from any claim of plaintiff. From such decree the plaintiff has appealed.

It is the position of respondents that, at the time of the entry of the decree against Phoebe D. Adams, and until the execution sale of her interest, she and respondents were tenants in common; that the decree of foreclosure as to the interest of Mrs. Adams was valid, and that, when appellant acquired her title, it was as much entitled to the possession as were the respondents; that, being a tenant in common with respondents, and occupying the real estate, did not prevent the running of the statute of limitations against the mortgage upon respondents' interest. Such must also have been the view of the trial court. Appellant, upon the other hand, contends that it became a mortgagee in possession, after the sale under the former decree, and that the statute did not run for that reason.

It is well settled that the statute of limitations does not run against the mortgage debt, when the mortgagee is in possession as such. *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 22 Am. St. 314, 13 L. R. A. 137; *Den v. Wright*, 2 Halsted 175, 11 Am. Dec. 546. The real question here is, was appellant a mortgagee in possession? Much has been said by the authorities as to what is necessary to constitute one a mortgagee in possession. It has been often held that the consent or agreement of the mortgagor is necessary, before a mortgagee can take and hold possession as such. But it has also been held that such assent or agreement may be implied from conduct or circumstances. *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. 613. To the same effect is *Jellison v. Halloran*, 44 Minn. 199, 46 N. W. 332. Later the same court squarely held that, after a default in a mortgage, when the mortgagee, in apparent good faith, makes a void foreclosure, and takes possession under cover of such proceedings, he is a mortgagee in possession, and is entitled to all the rights of such,

whether he takes possession with or without the consent, either express or implied, of the mortgagor. *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459. The same was held in *Cooke v. Cooper*, 18 Ore. 142, 22 Pac. 945, 17 Am. St. 709, 7 L. R. A. 273. The latter decision, after citing a number of New York cases, concluded its argument upon the subject as follows:

"It results, therefore, that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. This view of the law in no manner interferes with the just rights of the mortgagor, and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law, which have sometimes been permitted to prevail, and the mortgagee turned out of possession stripped both of the property and his mortgage debt as well."

The rule thus followed in the above cases seems to be in harmony with just principles. It is based upon the principle that, as the mortgagor asks relief in equity, he must first do equity; that is to say, pay the debt. No claim is made that the debt was ever paid in the case at bar. Upon what equitable principle can respondents ask relief, until they have paid the debt? They became owners of the land subject to the mortgage lien, and inasmuch as the mortgagee, in good faith, took and holds possession under an attempted foreclosure, after condition broken, we think he should be held to be a mortgagee in possession, and entitled to receive equitable treatment from respondents. Such holding is sustained by the authorities cited above, and since they seem eminently reasonable and just, we shall follow them.

The purchaser at a mortgage sale, which is void for any reason, becomes the assignee of the mortgage, and the debt secured thereby. *Smithson Land Co. v. Brautigan*, 16 Wash. 174, 47 Pac. 434; *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022. It follows that, when appellant purchased at the sheriff's sale, its ownership of the mortgage still continued, and the lien was unextinguished. In such case, where a mistake has been made, this court intimated, at the conclusion of the opinion in *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364, that equity will grant relief. That a mistake was made in the case at bar is manifest. The court found that, at the time this action was commenced, the appellant was not aware of the existence of respondents, as heirs of the deceased mortgagor, and that they were, therefore, not made defendants. It was further found that appellant and its successors in interest proceeded in good faith, relying upon the belief that the foreclosure proceedings carried the whole premises. There must be relief in equity from such a mistake. Relief was sought as soon as the facts constituting the mistake were discovered. The course pursued, as we have seen, was by petition in the foreclosure case for vacation of the former proceedings, and for leave to file an amended complaint, making the heirs parties. The course pursued is supported by the following: *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Boggs v. Fowler & Hargrave*, 16 Cal. 559, 76 Am. Dec. 561; *Burton v. Lies*, 21 Cal. 88.

The foreclosure should, therefore, proceed under the amended complaint. Inasmuch as the appellant is a mortgagee in possession, such possession having been held since 1897, the statute has not been running against the mortgage meanwhile, and the action is not barred as to respondents' interest. The decree of foreclosure should cover the whole of the mortgaged premises.

The cause is remanded, with instructions to modify the decree, and proceed in accordance herewith.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5499. Decided February 25, 1905.]

EDWARD VAN DE VANTER, *Respondent*, v. P. J.

FLAHERTY *et al.*, *Appellants*.¹

APPEAL—NOTICE—SUFFICIENCY. A notice of appeal from a judgment of the superior court, omitting the words, "to the supreme court" is sufficient since there is no other court to which the appeal could be taken.

HIGHWAYS—RIGHT OF WAY BY PRESCRIPTION—ADJOINING OWNERS—EVIDENCE—SUFFICIENCY. Where it appears that the owners of landlocked premises used a roadway across the lands of an adjoining owner and expended money in keeping it in repair, continually for nearly twenty years without hindrance from any person, a finding of a right of way by prescription is sustained, and will not be disturbed because of a conflict in the testimony as to the particular roadway actually traveled.

SAME—DEFENSES—CONVEYANCE WITHOUT RESERVING RIGHT. It is no defense to an action to establish a right of way by prescription across the lands of an adjoining owner, that the plaintiff formerly owned the lands subject to the use and mortgaged the same without reserving any right of way, defendants claiming through such mortgage, where, at the time of making the mortgage, the right of way existed in favor of other parties as appurtenant to the lands subsequently acquired by the plaintiff.

SAME—DEFENSE AS BONA FIDE PURCHASER. In an action to establish a right of way by prescription across the lands of an adjoining owner, the defendants cannot claim as bona fide purchasers without notice of the easement, where the evidence warranted a finding that the roadway was well defined and apparent, nor where they had actual notice of it, and of plaintiff's claims thereto.

¹Reported in 79 Pac. 794.

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Opinion Per RUDKIN, J.

SAME—LOCATION OF ROADWAY—UNCERTAINTY IN DECREE—JUDGMENT—DEPARTURE FROM PLEADINGS. In an action to establish a right of way by prescription across the lands of an adjoining owner, the judgment will be reversed and remanded for further evidence as to the location, where the description in the decree is uncertain and a departure from the pleadings, and testimony was not received with a view of locating the road with any degree of certainty.

SAME—WIDTH OF RIGHT OF WAY. A right of way by prescription is bounded by the line of reasonable enjoyment.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 2, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, establishing a prescriptive right of way. Modified.

The respondent moved to dismiss the appeal on the ground of insufficiency of the notice of appeal, which omitted the words, "to the supreme court."

Geo. McKay, for appellants.

Frank S. Griffith, for respondent.

RUDKIN, J.—The plaintiff is the owner of the northwest quarter of the northeast quarter of section 10, township 22, range 4. The defendants are the owners of the southeast quarter of the northeast quarter, and north half of the southwest quarter of the northeast quarter, of the same section. There is a public highway, known as the "Des Moines Road," running east and west through the center of said section 10. The land owned by the plaintiff is landlocked, and the only means of ingress and egress to and from said land is across the lands owned by the defendants, to the Des Moines road, a distance of about eighty rods. The plaintiff claims a roadway by prescription, across the lands of the defendants above described, and brings this action to establish said roadway, and to

enjoin the defendants from interfering with the use and enjoyment thereof. The plaintiff had judgment in the court below, and the defendants appeal therefrom. The motion to dismiss the appeal is denied, on the authority of *McConnell v. Kaufman*, 4 Wash. 229, 29 Pac. 1053.

While a great many errors are assigned in the appellants' brief, we think the only questions of any importance may be discussed under the following heads: (1) Has the respondent a roadway by prescription over the lands of the appellants? and (2), if so, is such roadway sufficiently described in the judgment of the court?

(1) The court below found in effect, that the land of the plaintiff is landlocked; that there is no means of ingress or egress to or from said land, except by a roadway running across the westerly side of the southeast quarter of the northeast quarter of said section 10; that said roadway has been used openly, notoriously, continuously, and adversely by the owners and occupants of the land now owned by the plaintiff, for a period of more than fifteen years, and the right to use said roadway over and across the lands now owned by the defendants has never been denied, but the same has been used with the knowledge of all persons who owned or occupied the lands of the defendants for said period of fifteen years or more, and said roadway has been for said length of time well defined, open, and apparent to all persons.

While there is decided conflict in the testimony as to the particular roadway actually traveled and used, this court would not be warranted in disturbing the finding of the court below in that regard, and, in all other respects, we think the finding is supported by the testimony. The witness Wilcoxon occupied the land now owned by the plaintiff from 1884 to 1898, and during all that period he used the roadway in question, and expended \$100 in building the roadway, and keeping the same in repair.

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This witness, and his successors in interest, used the roadway continually for nearly twenty years, without let or hindrance from any person, and, during all said time, expended more or less money in keeping the road in repair and fit for public travel. We think the testimony ample to establish a roadway by prescription, under the decisions of this court in *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777, and *Seattle v. Smithers*, ante p. 119, 79 Pac. 615.

The appellants allege in their answer that the respondent in this action was the owner of the lands now owned by the appellants, on the 7th day of April, 1893, and, on that date, mortgaged said lands to one Magnus, without excepting or reserving any right of way; that said mortgage was thereafter foreclosed, and the property sold, and the defendants are now the owners of the same through mesne conveyances from the purchaser at the foreclosure sale. We do not see the materiality of this defense. The roadway in question was not owned by this respondent at the time said mortgage was executed, but was owned by the then owner of the respondent's land, and was appurtenant thereto. If the roadway by prescription was good as against the mortgagor, it was equally good as against the mortgagee, and the purchaser at the foreclosure sale acquired his title subject to the easement.

The appellants cannot claim to be *bona fide* purchasers without notice of the easement, for two reasons: (1) because the court found that the roadway was well defined, open, and apparent to all persons, and (2) because the court found that the appellants, at and prior to their purchase of the lands now owned by them, had actual notice of the existence of this roadway, and of the respondent's claim thereto, and these findings are supported by the testimony. There was no error in the ruling of the court that the respondent has a roadway by prescription across the lands of the appellants.

(2) We think, however, the judgment will have to be reversed, on account of the uncertainty in the description of the roadway in the final decree. The complaint describes the roadway as running from the southeast corner of the respondent's land, across the west side of the southeast quarter of the northeast quarter of section 10. This description is uncertain in itself. We presume it was the intention of the pleader to locate the roadway on the west twenty feet of the southeast quarter of said northeast quarter; at least, it is so located in the plat in the respondent's brief. On the other hand, the findings of fact and decree describe the roadway as running from the southeast corner of the plaintiff's land, over and across the north half of the southwest quarter of the northeast quarter, and thence across the west side of the southeast quarter of the northeast quarter of section 10. The case does not seem to have been tried with a view of locating the roadway in question with any degree of certainty, and this court is unable, from the testimony, to correct the description, or remove the ambiguity which is apparent on the face of the record. The decree is certainly a departure from the complaint, and all the testimony seems to locate the roadway at some place along the westerly side of the southwest quarter of the northeast quarter of said section.

Complaint is also made that there was no testimony to support the finding that the roadway used was twenty feet in width. A right of way by grant, which is not limited in the grant itself, or a right of way by prescription, is bounded by the line of reasonable enjoyment. *Everett Water Co. v. Powers*, ante p. 143, 79 Pac. 617. When the case is remanded, the court below can ascertain and fix the width of the roadway, in accordance with the rule above announced.

The judgment is reversed, and the cause remanded with direction to the court below to enter a decree describ-

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Syllabus.

ing the roadway in question with common certainty, and fixing the width thereof, and to take further testimony to that end.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ.,
concur.

Root and Crow, JJ., took no part.

[No. 5448. Decided February 27, 1905.]

ALICE J. DAVIS *et al.*, Respondents, v. CITY OF SEATTLE,
Appellant.¹

PARTIES—HUSBAND AND WIFE—PERSONAL INJURIES TO WIFE—TRIAL AMENDMENT ADDING HUSBAND AS PARTY PLAINTIFF. Where a married woman brought an action for personal injuries in her own name, her husband being a necessary party thereto, and a motion to dismiss is made at the trial for defect of parties plaintiff upon the fact of marriage appearing, it is proper under Bal. Code, § 4953, to permit a trial amendment to the complaint, bringing in the husband as a party plaintiff, he being present and consenting, when no claim of surprise or request for a continuance is made, and there is no change in the issues.

MUNICIPAL CORPORATIONS—PERSONAL INJURIES—PRESENTING CLAIM BY MARRIED WOMAN—FAILING TO JOIN HUSBAND—OBJECTIONS. Under a city charter requiring claims for damages to be presented to the city council within thirty days, and providing that no action shall be maintained thereon until sixty days after such presentation, a claim for personal injuries presented by a married woman in her own name is sufficient to support an action therefor by the husband and wife, where the claim was not rejected by the city council on the ground that the husband was a necessary party thereto, or for any insufficiency in the notice, and where the claim was admitted in evidence without objection, and its sufficiency not questioned until after the findings of fact were filed; since the intent of the charter to give the city early notice was fulfilled, and the same is to be liberally construed.

¹Reported in 79 Pac. 784.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 3, 1904, upon findings in favor of the plaintiffs after a trial before the court, a jury being waived, in an action for personal injuries sustained through a defect in a sidewalk. Affirmed.

Mitchell Gilliam and Hugh A. Tait, for appellant.

Root, Palmer & Brown, for respondents

CROW, J.—This is an action to recover damages for personal injuries sustained by the respondent Alice J. Davis, in falling on a defective sidewalk, on one of the public streets in the city of Seattle. The action was originally commenced by Alice J. Davis alone, her husband not being joined as a party. Trial was had by the court, a jury being waived. It did not appear on the face of the original complaint that respondent Alice J. Davis was a married woman, and no question of any defect of parties was raised by demurrer or answer, or in any manner prior to the trial. Upon the trial, however, the evidence disclosed the fact that respondent Alice J. Davis, at the time of the injury, at the time of filing her claim with the city for damages, and at the time of trial, was a married woman, living with her husband, B. W. Davis. At the conclusion of respondent's evidence, appellant moved for judgment in its favor, for the reason that respondent Alice J. Davis, being a married woman, residing with her husband, who was not a party plaintiff, could not recover; that damages, if collectible at all, would be community personal property; and that the husband, having the management and control of the same, was a necessary party plaintiff. Prior to any ruling on this motion for judgment, the respondent Alice J. Davis, then the sole plaintiff, moved the court for leave to amend the complaint, by making her husband, B. W. Davis, a party plaintiff. This motion was granted, an

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Opinion Per CROW, J.

amended complaint was filed, and the husband, B. W. Davis, being present, appeared by his attorney, submitted himself to the jurisdiction of the court, and agreed to abide its decision. Thereupon the motion for judgment was denied. The appellant having introduced its evidence, the court made and filed its findings of fact and conclusions of law, the fifth finding of fact being as follows:

"(5) That within thirty days after the said 5th day of May, 1903, and within thirty days after the happening of the injury to the plaintiff, Alice J. Davis, described in said amended complaint herein, said Alice J. Davis presented to the city council of said city of Seattle, and filed with the city comptroller and *ex-officio* city clerk of said city, a claim for damages resulting to her by reason of the fall she sustained upon said sidewalk; that the said claim for damages was made, signed, presented and filed by said Alice J. Davis in her own behalf only, and that her said husband, the plaintiff B. W. Davis, did not formally join in said claim, and that no other claim for such injuries was ever filed with said city comptroller by said plaintiffs or either of them; that the said claim for damages, so presented and filed by said Alice J. Davis, was rejected by the said city of Seattle, and that it has refused to pay said claim, or any part thereof, and that more than sixty days elapsed after the said claim, so filed and presented by the said Alice J. Davis, had been filed and presented before the commencement of this suit."

Upon the findings and conclusions, judgment was entered in favor of respondents, Alice J. Davis and B. W. Davis, her husband, for \$500, and costs, and this appeal was taken.

The first contention of appellant which we will consider is that the court erred in allowing the amendment whereby the husband, B. W. Davis, was made a party plaintiff; appellant insisting that a married woman, residing with her husband, cannot, suing alone, recover damages for personal injuries sustained by herself, and that it is

error to permit her, as such plaintiff, having no cause of action, to amend her complaint, and make her husband, the party having the cause of action, a party plaintiff, and to do so after the conclusion of the original plaintiff's evidence, and after she had rested her case on the trial.

This court has held in *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808, that an action for damages, based on personal injuries sustained by the wife, must be brought in the name of the husband, and that the wife, while not a necessary party, is a proper party, to such action. While the respondent Alice J. Davis could not have recovered in this action, suing alone, did the court commit error in permitting the amendment whereby the husband, B. W. Davis, was made a party plaintiff, and afterwards, with his wife, recovered judgment?

Section 4953, Bal. Code, provides: "The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by *adding* or striking out the name of any party," etc. We think that, under this section, and under the circumstances of this case, the amendment was properly allowed. Appellant did not claim any surprise, and made no request for a continuance; no new issues, requiring additional preparation for trial, were formed; unnecessary delay and loss of time were avoided; there was no material change in the cause of action, or in the defense, and no abuse of discretion by the court was shown. The amendment was certainly in "furtherance of justice," was properly allowed, and not erroneous. *Hulbert v. Brackett*, 8 Wash. 438, 36 Pac. 264; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Alend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352; *Daly v. Everett Pulp etc. Co.*, 31 Wash. 255, 71 Pac. 1014;

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Thomas v. Price, 33 Wash. 459, 74 Pac. 563, 99 Am. St. 961.

The remaining assignment of error urged by appellant presents a question of more difficulty. Appellant insists that the husband and wife cannot recover damages against the city of Seattle, under its charter provisions relative to the presentation of claims for damages for personal injuries sustained by the wife, where the husband has failed to file or present a claim for such damages in his own behalf, or in behalf of the community, and where the only claim for such damages was one filed and presented by the wife alone, and in her own behalf only.

We have above set forth in the statement in this case, the fifth finding of fact made by the court; and the question now presented is, whether the claim filed by Mrs. Alice J. Davis, as shown by such finding of fact, was a compliance with art. 4, § 29, of the charter of the city of Seattle, sufficient to enable her husband and herself to jointly prosecute this action. The section of the charter referred to reads as follows:

"§ 29. All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim, or any part thereof, or appropriating money or other property to pay or satisfy the same, or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

We have no hesitancy in saying that it would have been a far better and safer practice to have presented the claim on behalf of the husband, who was the party authorized

to prosecute the action, as well as on behalf of the wife, who sustained the personal injury. Does it necessarily follow, however, that because the husband must bring the action in his own name, the wife cannot, herself and alone, as has been done in this case, file with the city a written claim for damages?

In passing upon this question, we feel that we should consider the reason which called for the enactment of this charter provision. Was it to require a technical and careful presentation of the claim, in every sense of the word, or was it for the purpose of simply giving the city a reasonable written notice of the existence of the claim, at an early date after the happening of the accident, so that it, the city, might have every favorable opportunity for investigating all of the facts and circumstances surrounding the transaction, and thereby be enabled to determine and ascertain the extent of its liability, if any, before evidence was lost, or existing conditions had materially changed? We think the latter was the purpose to be accomplished.

This exact question has not been heretofore presented to this court. This and similar charter provisions, however, have been before us for consideration, and, in the interest of justice, it has been our universal practice to give the same a liberal construction. *Bell v. Spokane*, 30 Wash. 512, 71 Pac. 31; *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383; *Sproul v. Seattle*, 17 Wash. 256, 49 Pac. 489; *Born v. Spokane*, 27 Wash. 723, 68 Pac. 386; *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827; *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145.

It appears from the record that the claim actually presented by respondent Alice J. Davis was considered and rejected by appellant. In *Pearson v. Seattle*, 14 Wash. 442, 44 Pac. 884, it was urged, upon the trial, that a proper claim had not been filed, because the same had not been

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verified as required by the charter. It appeared, however, that the claim had not been objected to or rejected on that ground, but solely on the ground that the city was not liable. This court held that the position of the appellant city, in objecting to the sufficiency of the claim, at the time it did, was not well taken in that case. We see no reason why the same rule should not apply here. *Griswold v. Ludington*, 116 Mich. 401, 74 N. W. 663; *Grothier v. New York & Brooklyn Bridge*, 19 N. Y. App. Div. 586; *Lindley v. Detroit*, 131 Mich. 8, 90 N. W. 665.

It is only urged by appellant that the claim was not formally presented by the husband, in his own behalf or in behalf of the community. There is nothing in the record to show, nor is it urged, that the claim presented did not conform, in every other respect, to the requirements of the charter. It appears to have been considered and rejected by appellant, through its proper authorities, and the record utterly fails to show that the regularity or sufficiency of the claim, as to its form, or as to the person by whom it was signed, or presented, was ever questioned, until after the findings and conclusions herein were made and filed. The claim was admitted in evidence without objection. The statement shows that appellant caused the respondent Alice J. Davis to be examined by a physician, selected by itself. The written claim was not made defective simply because it was not signed by the parties entitled to recover. This court has held in *Born v. Spokane*, *supra*, that a plaintiff was not obliged to present or sign his claim in person. We fail to see why a wife might not, on behalf of the community, present a claim for damages based upon personal injuries sustained by herself.

We cannot understand how appellant has been deprived of any substantial right by reason of the alleged defective claim. Every opportunity was promptly afforded for investigation, and for protection of appellant's interest. We

therefore think that, under the circumstances of this case, the notice of claim must be held to be sufficient. There being no prejudicial error in the record, the judgment of the superior court is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

FULLERTON and RUDKIN, JJ., dissent.

ROOT, J., took no part.

[No. 5185. Decided February 27, 1905.]

RICHARD HAYNES, *Respondent*, v. C. F. GAY, *et al.*,
Appellants.¹

BILLS AND NOTES—USURY—BONA FIDE PURCHASER—AGENT'S KNOWLEDGE—EVIDENCE—SUFFICIENCY. Where the defense of usury is interposed to a note secured by chattel mortgage, valid on its face, and purchased by the agent of plaintiff, who claims as an innocent purchaser, the burden of proof being upon the defendants, it is not sufficient evidence of knowledge on the part of the agent of the usurious character of the note that he instituted a statutory foreclosure in the name of the payee as plaintiff, and only substituted the plaintiff as the party in interest upon the defendants' bringing the foreclosure into court; since the knowledge of the payee was not knowledge of the agent, and making the payee plaintiff might have been through a misconception of the law, and was not necessarily a suspicious circumstance.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 24, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing the foreclosure of a chattel mortgage. Affirmed.

L. H. Prather, for appellants.

James Hopkins, for respondent.

¹Reported in 79 Pac. 794.

Feb. 1905.]

Opinion Per Curiam.

PER CURIAM.—This was an action by Richard Haynes, as assignee of V. L. Harvey, to foreclose a chattel mortgage, given to secure a certain promissory note. The answer of the defendants admitted the execution of the note, but, as an affirmative defense, alleged that the note was tainted with usury, in that it was given partly in payment of usurious interest, and the usurious character of the note was fully set out. It was also alleged that the plaintiff purchased said note with full knowledge of its usurious character. The lower court found for the plaintiff, and rendered judgment accordingly. Defendants appeal.

The note is an ordinary negotiable note, and contains nothing on its face to indicate its character. The note was undoubtedly usurious, but the only question proper for us to consider is, was the plaintiff an innocent purchaser without notice of its true character? Haynes was a resident of California, and personally knew nothing about the note, but the note was purchased for him by his agent, James Hopkins, and it must be conceded that, if the agent Hopkins knew the character of the note when he purchased it, that would be notice to his principal. The record discloses that James Hopkins brought proceedings originally as attorney for V. L. Harvey, to foreclose the mortgage, under the summary provision of the statute providing for the foreclosure of a mortgage out of court. The appellants applied for and secured an order to bring the action into the superior court. The burden of proof was upon the appellants to show that Hopkins knew of the usurious character of the note, and the appellants asked the superior court to find that the plaintiff had notice of its true character, from the alleged suspicious circumstance that, when the case was brought into the superior court, Mr. Hopkins asked permission to substitute Mr. Haynes as the real party in interest, while the testimony shows

that Mr. Hopkins bought the note before his attempt to foreclose by notice and sale. This may have been a suspicious circumstance, or it may not. Mr. Hopkins may have originally had a misconception of the law with reference to the necessity of making Mr. Haynes the plaintiff in his proceedings to foreclose the mortgage. Knowledge of the usurious character of the note in Mr. Harvey was not necessarily knowledge in Mr. Hopkins, and, there seeming to be no other evidence in the record tending to show knowledge on the part of Mr. Hopkins, we are of the opinion that the lower court correctly found for the plaintiff.

Judgment affirmed.

[No. 4961. Decided February 27, 1905.]

J. A. ROCHFORD, as Assignee of C. H. Williams, Respondent, v. MORTON DOTY et al., Appellants.¹

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACCOUNTING BY ASSIGNEE—ACTION FOR—DEFENSES—CROSS-COMPLAINT—ORDER DIRECTING SUIT AGAINST ASSIGNEE—VACATION. In an action against an assignee for the benefit of creditors to compel him to account to his successor for the funds of the estate, affirmative matter in the answer, in the nature of a cross-complaint, seeking the vacation of the order of the court upon which the suit is founded, is properly struck out on motion, since the order directing the suit to be brought is not final or binding upon the defendant, and is not a bar to any defense he may have to the action.

SAME—DEFENSES — PLEADING — PRIOR ATTACHMENT — ASSIGNEE COMPELLED TO PAY FOR PROPERTY TAKEN ON CLAIM AND DELIVERY BOND. It is a good defense *pro tanto* to an action against an assignee for the benefit of creditors and his bondsman, to compel him to account to his successor for the funds of the estate, that a certain part of the insolvent's estate had been attached prior to the deed of assignment, the lien thereafter adjudged valid, and the

¹Reported in 79 Pac. 782.

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Opinion Per FULLERTON, J.

defendant ordered to pay the attaching creditor the value of the property, which defendant, in an endeavor to protect the estate had taken from the sheriff upon a claim and delivery bond; and it is error to sustain a demurrer thereto.

SAME—DEFENSES—PLEA OF DISCHARGE—COLLATERAL ATTACK. A plea of a final discharge, upon due notice and the allowance of his final account, is a complete defense to an action against an assignee for the benefit of creditors to compel him to account to his successor for the funds of the estate, since it is a bar to further proceedings that cannot be collaterally attacked; and it is error to sustain a demurrer thereto.

Appeal from a judgment of the superior court for Stevens county, Richardson, J., entered July 17, 1903, in favor of the plaintiff, after striking portions of the answer and sustaining a demurrer thereto, in an action for an accounting. Reversed.

Danson & Huneke, for appellants.

O. C. Moore and Cullen & Dudley, for respondent.

FULLERTON, J.—In his complaint the respondent alleged, that on the 6th day of August, 1898, one C. H. Williams, who was then doing business at Northport, in this state, under the name and style of the Columbia Hardware Company, made a general assignment for the benefit of all his creditors, naming the appellant Morton Doty as his assignee; that thereafter Doty filed his oath and bond as required by law, took possession of all of the property and assets of Williams, and made and filed an inventory of such property and assets, showing the same to be of the value of \$2,071.11, and received and took into his possession all of such property; that thereafter Doty made and filed in court a purported showing and report of his acts and doings as such assignee, which report the court disallowed and refused to approve; that, thereafter on June 25, 1900, after proper proceedings had, an order

was made and entered in the court before whom the insolvency proceedings were pending, removing Doty as such assignee, appointing the respondent in his stead, and directing Doty to account to the respondent for all property received by him belonging to the trust estate; that thereafter Doty pretended to comply with such order, and did file a pretended report of his doings as assignee, which report the court found to be false and incomplete, and refused to approve, ordering him to file a further and true account of his doings as such assignee, which order, also, he neglected and refused to comply with; that on the 22nd day of July, 1901, the court made an order directing Doty to appear in person before the court commissioner on the 26th of August, 1901, then and there to be examined and give testimony, concerning his acts and doings pertaining to his trust, which order was regularly served upon him, within the state of Washington, as required by law, but that Doty failed and neglected to appear at the time and place designated, or otherwise comply with the directions of the court; that the court commissioner thereupon entered a default against him, and proceeded to hear testimony concerning the property in his hands; that at such hearing the commissioner found that the property committed to his care was of the value of \$2,071.11, and that he had converted the same to his own use, and thereupon directed the respondent to bring an action against Doty and his bondsman, to recover the amount so found to be due. It was also alleged generally that Doty had failed, neglected, and refused to account for any of the property, so received by him, and that the same was of the value named in his inventory thereof, namely, \$2,071.11. The prayer was for judgment in that sum, against Doty and the bondsman, his co-appellant in this action.

The appellant The Fidelity & Deposit Company appeared and filed a general demurrer to the complaint, which

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the trial court overruled. It thereupon answered, denying generally the various allegations of the complaint not matters of record, and as to certain of these, it denied their legal effect, averring that the orders of court were made *ex parte* and without notice to Doty. It also, by way of an affirmative defense, alleged, in substance, that prior to the making of the assignment, an attachment had been sued out of the superior court of the county of Spokane, in an action in which the Marshall-Wells Hardware Company was plaintiff, and the assignor of Doty was defendant, which was levied by the sheriff of Stevens county on the stock of hardware owned by the assignor and assigned by him to Doty, and that said sheriff held the property under and by virtue of the writ, at the time Doty received the deed of assignment and gave bond, as mentioned in the complaint; that, after receiving the deed of assignment, Doty made affidavit, pursuant to statute, claiming to be entitled to the property, and gave bond in the sum of \$2,000 to the sheriff, and took the property from the sheriff's possession; that thereafter Doty sold the goods, and received therefor the sum of \$626.25; that thereafter judgment in that action went against the principal debtor, in which judgment the attachment lien was adjudged to be a superior lien to any claim Doty had therein by virtue of the deed of assignment, and that Doty was thereupon compelled to pay the judgment, which amounted to \$896.74. It then alleges that Doty, on or about the 20th day of May, 1899, made and filed, in the court in which the assignment proceedings were pending, a final report of his acts and doings, as such assignee, which report came on regularly for hearing on June 20, 1899, when the same was duly approved, ratified, and confirmed by the court, and Doty discharged as such assignee, and the answering defendant discharged from further liability as surety on his bond.

The appellant also filed, in connection with its answer, a cross-complaint in which it asked to have the order of the court, on which this action is founded, set aside and held for naught, because, as it alleges, the same was made without notice to Doty, or service upon him of process of any kind whatsoever. As a part of this cross-complaint, it repeated its allegations to the effect that the property of the estate had been taken from Doty by virtue of the writ of attachment, levied thereon prior to the execution of the deed of assignment, and that Doty had filed his final account with the estate in 1899, which had been settled and allowed, and an order entered discharging him as such assignee, and exonerating his bondsman. The appellant Doty, also, appeared and answered the complaint, his answer in substance being the same as that of his co-defendant just noticed.

The respondent moved against these answers, and the court struck therefrom, among other minor matters, the allegations with reference to the levy and the order of discharge, in both the answers and the cross-complaints. Demurrers were thereupon interposed to the cross-complaints, which the court sustained. Thereupon the appellants refused to plead further, and elected to stand upon their answers, when judgment was entered against them for the sum demanded in the complaint.

While the arguments of counsel have taken a wide range, and somewhat extended briefs have been filed on the questions thought to be involved, it seems to us that the actual questions presented are simple and not difficult of solution. We think the motions to strike, and the demurrers, in so far as they were directed to the cross-complaints, were properly sustained. There is nothing in the complaint which calls for the remedy therein demanded. The court's order directing this action to be begun, if its legal effect is correctly set out in the complaint, is in no sense a final

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order or judgment, binding the appellants in any manner. It was nothing more than an order of the court, commanding its receiver to begin an action to recover a judgment for supposed delinquencies on the part of a former receiver; it was not in itself a judgment. This being true, it could not be a bar to any defense the appellants had to the action, and hence there was no necessity for its vacation.

On the other hand, we think the court erred in striking from the answers proper, and in entering a judgment on the pleadings. These answers presented a complete defense to the action. If it be true that the property of the insolvent's estate had been attached, in an action brought against the insolvent prior to the making of the deed of assignment, and the attachment lien was afterwards adjudged valid and superior to any right acquired therein by the appellant Doty by virtue of the deed of assignment, then Doty is not obligated to account to the other creditors of the assignor for any of the property required to be taken in satisfaction of that lien, even though he did take the property and substitute his own bond in its stead. His purpose was to protect the estate, and it would be the grossest injustice to hold that his endeavor to do so made the obligation his own. An assignment is an equitable proceeding, and the assignee should be upheld in all of his actions intended for the benefit of the estate, and which do not result in injury thereto. This part of the answer, therefore, is a good defense against the demand for so much of the property of the estate as was taken in satisfaction of the judgment, in the action out of which the attachment was issued.

The plea of the order of discharge is a complete defense to the entire action. If it be true that the assignee filed his final account as such, that a hearing was had thereon after reasonable notice, and that an order settling and al-

lowing the account, discharging the assignee and exonerating his bondsman was entered, the order is a bar to any further proceedings, so long as it stands on the record not vacated or reversed. If it was entered in fraud, those affected by it must attack it directly, and set it aside for that reason before they can ask for a new account¹. They cannot attack the order collaterally.

The judgment appealed from is reversed, and the cause remanded with instructions to reinstate the case, overrule the motion to strike from the answers and proceed regularly with the hearing of the cause.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4907. Decided February 27, 1905.]

GO FUN, *Respondent*, v. FIDALGO ISLAND CANNING
COMPANY, *Appellant*.¹

APPEAL AND ERROR—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence is controlling and will not be disturbed on appeal.

CONTRACTS—BREACH—STIPULATED DAMAGES—EVIDENCE OF ACTUAL PROFITS—IMMATERIALITY. In an action upon a contract to pack fish for a canning company, wherein stipulated damages of forty cents a case are agreed upon for each case less than 3,300, upon the failure of plaintiff to pack that number each day, it is proper to exclude evidence of the actual profit on each case of fish packed, offered by the defendant for the purpose of showing that it did not refuse the use of the machinery during certain hours, since there was no issue as to such profits, and the evidence would tend to confuse the jury.

CONTRACTS—CONSTRUCTION — SUNDAYS — WORK UPON—INSTRUCTIONS. In an action upon a contract to pack a certain number of cases of fish for a canning company on every day during the continuance of the contract, and for stipulated damages per case for

¹Reported in 79 Pac. 797.

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any shortage in the required amount, it is proper to instruct the jury to the effect that the plaintiff could not be charged with any shortage occurring on Sunday, nor offset the fish packed on Sunday against shortages occurring on other days, since the contract did not require work on Sundays.

APPEAL AND ERROR—REVIEW—INSTRUCTIONS. It is not error to refuse specific instructions that are covered in the general charge.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 11, 1903, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon contract. Affirmed.

Quinby & Wells, for appellant.

Kerr & McCord, for respondent.

MOUNT, C. J.—This action was begun by the respondent to recover from appellant an alleged balance on a contract for canning fish. The complaint alleges the contract, a compliance therewith by the respondent, and a balance due him, amounting to \$2,047.85. The appellant's answer admits the contract, but denies compliance therewith on the part of the respondent, and also alleges an over-payment to the respondent, amounting to \$2,187.80, and prays judgment for that amount. Respondent's reply denies the new matter in the answer. Upon these issues, the case was tried to the court and a jury. A verdict was returned for the full amount of respondent's claim. From a judgment on the verdict, this appeal is prosecuted.

The contract, after providing that the respondent should pack 3,300 cases of fish per day, at the Anacortes cannery, among other things, contained the following provision:

"That the said party of the first part [the respondent] further agrees that he will pay to said second party [the appellant] the sum of forty cents per case for each case less than 3,300, which he shall fail to pack at the Anacortes cannery on any day . . . during the continuance

of this contract, if the failure to make the required pack arises from lack of men or want of skill on the part of the workmen furnished by the said first party; but if any shortage of the pack arises from the failure on the part of the second party to furnish sufficient fish, or for the failure on the part of the machinery furnished to do proper work, no charge shall be made for any shortage."

It was stipulated at the trial that the respondent packed the number of cases required by the terms of the contract, and that, at the contract price, he earned \$70,514.54; that he had been paid by appellant \$68,466.69, leaving a balance of \$2,047.85. It was conceded that respondent did not pack the guaranteed number of cases per day for a number of days, aggregating a shortage of 10,467 cases. Respondent contended below that, by the terms of the contract, he should pay for such shortage only when the same was brought about by the lack of men, or lack of skill of the workmen, furnished by him; and that he was not liable for the actual shortage above stated because such shortage was occasioned by the negligence of the appellant in not furnishing sufficient fish, and because of failure of the machinery to do proper work. Appellant contended that the shortage was occasioned solely by the negligence of the respondent in failing to furnish a sufficient number of skilled men. This was the only issue of fact in the case, and appellant's main contention before this court now is that there is no evidence to support the verdict, and that a careful weighing of the evidence shows a clear preponderance against the verdict. In view of this contention, we have gone very carefully over the entire evidence sent here, and find that there is much thereof in support of the contention of each side to the controversy. Under the uniform rulings of this court in such cases, the verdict of the jury is controlling. The jury having found the issues of fact in favor of the respondent, the verdict will not be disturbed.

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In the course of the trial the appellant sought to prove that the actual profit on each case of fish was \$2, for the purpose of showing that certain other evidence—to the effect that appellant refused to permit the use of machinery beyond certain hours—was untrue. This evidence was refused, we think properly, because there was no issue upon the pleadings as to the damages for failure to pack fish as agreed; such damages were stipulated by the contract; and, also, because such an issue was entirely collateral, and, if injected into the evidence, would tend to mislead and confuse the jury. Appellant also contends that the court erred in instructing the jury to the effect that they could not charge the respondent for any shortage occurring on a Sunday, and that the respondent could not offset the amount of fish packed on Sunday against shortages occurring on other days, upon the grounds that these instructions were misleading, and would tend to confuse the jury. Neither of these grounds appears to us to be tenable. No claim was made by either side that the respondent was required by the contract to work upon Sundays. The giving of these instructions therefore eliminated what was done upon such days, and must have had the effect to simplify the issues rather than confuse them. In any event, the instructions are entirely free from reversible error.

Appellant further complains of the refusal of the court to give the following requested instruction:

“As the parties to this action have agreed that, in case the plaintiff should fail at any time to put up 3,300 cases of fish each day, unless that failure is due to the defendant failing to furnish sufficient fish or keep the cannery and machinery in working condition, the plaintiff should pay forty cents per case for each case less than 3,300 so packed, you are instructed that such agreement is binding on the plaintiff, and it is not necessary for the defendant to prove that he has been damaged to that amount, but you must find that he has been damaged to that amount and deduct

that amount from what would otherwise be due the plaintiff."

The substance of this instruction was given by the court in other instructions. It was, therefore, not error to refuse this one.

There is no reversible error in the record, and the judgment is therefore affirmed.

FULLERTON, DUNBAR, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5086. Decided February 27, 1905.]

LULU ROLLER, by *E. C. Million, her Guardian ad Litem*,
Respondent, v. *E. W. ROLLER, Appellant*.¹

PARENT AND CHILD—WRONGS OF PARENT—DAMAGES—ACTION BY CHILD AGAINST PARENT—RAPE. A minor child cannot maintain an action for damages against a parent for injuries inflicted while the family relation exists, and the fact that the wrong was the heinous offense of rape, for which the father was convicted and imprisoned, does not, in effect, emancipate the daughter or authorize the action.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered January 14, 1904, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for damages for the commission of rape. Reversed.

Henry McLean, for appellant.

Gable & Seabury and *Million & Houser*, for respondent. The plaintiff was emancipated by the act of the defendant. *Rodgers*, Domestic Relations, § 467; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115; *Watson v. Watson*, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111.

¹Reported in 79 Pac. 788.

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Opinion Per DUNBAR, J.

DUNBAR, J.—The defendant was convicted of the crime of rape, committed upon his minor daughter, Lulu Roller, and was sentenced to a term in the penitentiary at Walla Walla. This action was commenced by the said Lulu Roller for the purpose of recovering from said defendant damages for said rape, in the sum of \$2,000, and the homestead of the defendant, upon which the minor children of the defendant were residing, was attached. The said Lulu Roller, at the time of the commencement of this action, was fifteen years old. The homestead in dispute was the community property of Roller and his deceased wife, Emma Roller. The defendant interposed a demurrer to the complaint of the plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action, in that the plaintiff, being the minor child of defendant, living with him and unemancipated, had no right to sue for a tort committed by the parent upon the child. Motion was made to discharge the attachment, (1) because the land was the homestead exempt under the state law, and (2) because the land was exempt under the federal statute, which exempts such property from debts contracted before the issuance of the patent. The motion to discharge the attachment was overruled. Upon the trial of the cause, judgment was entered in favor of the plaintiff for the sum of \$2,000.

It is assigned that the court erred in overruling the demurrer of the appellant to the amended complaint of the respondent, and in overruling the motion to dissolve the attachment. It is the contention of the appellant that a minor child cannot sue a parent for damages arising upon tort, that such actions are against public policy, and not permitted by the law. The rule of law prohibiting suits between parent and child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest or-

ganization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state.

This view, in effect, is not disputed by the respondent, who admits the general proposition that the domestic relations of the home and family fireside cannot be disturbed by the members thereof, by litigation prosecuted against each other for injuries, real or imaginary, arising out of these relations; but he asserts that the law has well defined limitations, and that every rule of law is founded upon some good reason, and the object and purpose intended to be attained must be looked to, as a fair test of its scope and limitations; that, in the case at bar, the family relations have already been disturbed, and that, by action of the father, the minor child has, in reality, been emancipated; that the harmonious relations existing have been disturbed in so rude a manner that they never can be again adjusted; and that, therefore, the reason for the rule does not apply.

There seems to be some reason in this argument, but it overlooks the fact that courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn; for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree. Hence, all the disturbing confusion would be introduced which can be imagined under a system which would allow parents and children to be involved in litigation of this kind.

Outside of these reasons which affect public policy, an-

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other reason, which seems almost to be *reductio ad absurdum*, is that, if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him. In addition to this, the public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, to be appropriated by any particular one.

At common law it is well established that a minor child cannot sue a parent for a tort. It is said by Cooley on Torts, p. 276, under the title of "Wrongs to a Child:" "For an injury suffered by the child in that relation no action will lie at the common law." And this has been held to be analogous to coverture, where a husband or wife is forbidden to sue the other spouse for torts or wrongs committed upon them to their damage during coverture, even refusing the action after the relation, by a divorce, has ceased to exist. See *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, which is simply an expression of the universal law on that subject. See, also, *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 72 Am. St. 550, 40 L. R. A. 757

Mr. Schouler, in his work on Domestic Relations, § 275, after discussing the proposition of filial relations, says:

"With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if an offender at all, by forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from

parental control and under counter-influences, against his own parent, either for services accruing during infancy or to recover damages, for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation; . . .”

This text goes beyond the circumstances of the case at bar, where the action was brought during the minority of the plaintiff. As will be seen by the extract above quoted, it is even forbidden after the child becomes of age, if the injury sued upon is referable to the period of minority. So well is this principle of the law understood that there have been very few attempts to inaugurate actions of this kind. The only one to which we are referred by brief of counsel, or which we have been able by independent investigation to discover, which seems to be in point, is *Hewlett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682, where it was held that a parent is not civilly liable to a child for personal injuries, inflicted during minority, and where the relation of parent and child with its mutual obligations exist. This was an action by the daughter against the mother for wrongful incarceration in an insane asylum, and was brought after the marriage of the daughter who, at the time of the alleged injuries, was separated and living away from her husband—a much stronger case, it will be seen, in favor of entertaining an action, than the one at bar, so far as the relations of the parties were concerned. The court, in refusing the remedy, said:

“The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand.”

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There being no authority at common law for such an action, and it not being claimed that there is any statutory provision for an action of this kind, we are of the opinion that the action should not have been entertained, and that the demurrer to the complaint should have been sustained. This conclusion renders unnecessary a discussion of the other questions involved.

The judgment is therefore reversed, with instructions to the lower court to sustain the demurrer to the complaint.

MOUNT, C. J., HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT and CROW, JJ., took no part.

[No. 5050. Decided February 27, 1905.]

AUGUST VAN BEHREN, *Respondent*, v. AUGUST
RETTKOWSKI *et al.*, *Appellants*.¹

PLEADINGS—AMENDMENT—DISCRETION OF COURT. Error cannot be predicated upon the allowance of an amended complaint in that it changed the cause of action, where the court acted within its discretion in allowing the amendment and the defendants were not misled or prejudiced.

APPEAL AND ERROR—REVIEW—EVIDENCE ON TRIAL DE NOVO. Error cannot be predicated on the improper admission of evidence in a case tried on the evidence in the supreme court, since it will be disregarded.

APPEAL AND ERROR—REVIEW—EVIDENCE. Findings will not be disturbed when justified by the evidence, although the same is conflicting.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered July 10, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing the conveyance of certain lands, and awarding damages. Affirmed.

¹Reported in 79 Pac. 787.

Myers & Warren, for appellants.

Martin & Grant and *W. E. Southard*, for respondent.

PER CURIAM.—This action was brought by the plaintiff to compel the defendants to reconvey to him the property described in the complaint, and for damages for refusal to so convey, in the sum of \$600, and for the further sum of \$1,519, rentals for said premises, received by the said defendants, and for costs and disbursements. The defendants moved the court for an order requiring the plaintiff to make his complaint more definite and certain, whereupon an amended complaint was filed. Upon the issues being joined, and a trial by court, findings were made by the court, and a judgment rendered in favor of the plaintiff.

The appellants assign error of the court in allowing the respondent to file his second amended complaint, claiming that it entirely changed the cause of action, and contradicted the allegations of his first two complaints. An examination of these respective complaints convinces us that the court acted well within its discretion in allowing the amended complaint filed, and that the appellants were in no way misled or prejudiced by the filing of said complaint.

It is also assigned that the court erred in the admission of certain evidence. We have uniformly held that a cause will not be reversed for the admission of evidence in a case which is tried upon the evidence by this court; but, if it is inadmissible, it will simply be disregarded by this court.

The other errors relate to the findings of fact and conclusions of law. No good purpose will be subserved by reviewing in detail the evidence in the cause, which was more or less conflicting. It is sufficient to say that an examination of the record convinces us that the findings of

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fact were abundantly justified by the testimony, and, such findings justifying the conclusions of law and the judgment, the same will be affirmed.

[No. 5084. Decided February 27, 1905.]

FRANK TERRY, as *Guardian of James Coates, Respondent*,
v. HENRY C. SICADE, as *Administrator of the*
*Estate of James Coates, Deceased, Appellant.*¹

GUARDIAN AND WARD—FINAL ACCOUNT—COMPROMISE OF LITIGATION BY ORDER OF COURT—CONTRACT BY INDIAN—VALIDITY. Where a suit has been commenced against an Indian and his guardian for a conveyance of lands, pursuant to a contract made by the Indian before the removal of restrictions upon the power of alienation, upon which contract \$1,600 had been paid to the Indian from time to time, the court may authorize the guardian to compromise the suit by the payment of \$2,000, regardless of the validity of the contract, where it appears that the land has become valuable, and the court finds it to be for the best interests of the estate to end the litigation; and after the guardian has made such payment under the order of court, the invalidity of the contract cannot be urged against the allowance of a credit for such payment in the guardian's final account, exceptions to which are properly overruled.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered October 6, 1903, overruling exceptions to a guardian's final account. Affirmed.

Leo & Cass, for appellant.

F. Campbell, for respondent.

HADLEY, J.—This appeal is from an order denying exceptions to the final report of a guardian. The guardianship was for James Coates, a Puyallup Indian, and an

¹Reported in 79 Pac. 789.

adult person. Coates was the allottee of certain lands in the Puyallup Indian reservation. Prior to his guardianship, he made a contract with one Ross for the sale of said lands. The contract provided that, in consideration of \$600, which was then paid, Ross should have the use of the premises for two years, and after two years it should become an absolute conveyance, upon payment of the further sum of \$12,000. The effect of the contract was that, upon payment of the consideration specified, and when the restrictions against alienation of the land should be removed, the contract should operate as an absolute conveyance to Ross. The contract was made long before the guardianship of Coates was instituted. From time to time, Ross paid Coates upon the contract, in addition to the \$600 paid at the time it was made, until the payments aggregated about \$1,600. After the establishment of the guardianship of Coates, Ross brought suit against Coates, his wife, and the respondent as guardian, to enforce the contract of sale.

After the commencement of said suit, the guardian filed a petition in the guardianship case, setting forth the facts as to the making of the contract for alienation by his ward, and that the latter had been paid thereunder about \$1,600. It was also shown that the land had become valuable, and that, while Ross was asserting, by suit, his right to specific performance, yet he was willing to accept, as a compromise, a payment of \$2,000, and drop the litigation and cancel the contract. It was also made to appear that \$2,000 was substantially the equivalent of the \$1,600 already received by Coates, together with interest thereon for its use meanwhile, and that it was in the interest of the ward's estate to make the compromise. The court so found, and ordered the guardian to make the payment in compromise and settlement of the litigation. The guardian accordingly paid the money. Thereafter Coates died, and the ap-

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pellant was appointed administrator of his estate. Respondent, as guardian, filed his final account, and asked credit for the amount paid out as aforesaid. Appellant, as administrator, objected to said allowance, and asked that the order authorizing its payment be vacated. The exceptions to the final report were overruled, and the administrator has appealed from the order denying the exceptions.

It is argued by appellant that the contract between Coates and Ross was, by its terms, a mere lease for two years, and that the attempt to make it operate as a conveyance after that time was illegal, by reason of restrictions upon alienation of the allotted lands. It is therefore contended that the partial payments upon the illegal contract imposed no liability from Coates to Ross for the return of the money, or its equivalent. It is not for us here to determine as to the validity of the contract. That was directly involved in the suit for specific performance, brought against Coates in his life-time, and also against his guardian. The question before us now is, shall the guardian be credited with the \$2,000 paid to compromise that suit? He was ordered by the court to pay it. Without regard to the validity of that contract, it was apparent to the court that, by reason of it, the estate of the ward was already involved in troublesome and expensive litigation. The court deemed it to be in the interest of the estate to pay the \$2,000, and stop the litigation. It was the duty of the court to direct the guardianship trust so as to effect the best results for the estate. The court may have believed that, not only would a moral obligation be discharged by the payment of the money, as a return for value received, but that it would result in actual financial gain to the estate by reason of escaping expensive litigation which could not be otherwise avoided. We find nothing in this record which convinces us that the course pursued was not in the

interest of the estate. We shall therefore not disturb the order denying the exceptions to the final report of the guardian.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5494. Decided February 27, 1905.]

R. J. MAHONEY, *Respondent*, v. C. E. CROCKETT,
Appellant.¹

CONTRACTS—EVIDENCE—PLEADING AND PROOF—CHATTEL MORTGAGES—FORECLOSURE—DEFENSES. In an action to foreclose a chattel mortgage, a contract tending to show that the plaintiff agreed to pay off the mortgage indebtedness upon the acceptance by him of the title to certain mining property, and other documents having no apparent bearing on the case, are not admissible under an answer alleging that the mortgage was executed to be held in trust by the plaintiff until he should satisfy himself as to the title and rights of a corporation in certain lands, and that the plaintiff had investigated said title and rights, and was satisfied with the same.

SAME. In such a case, it is not admissible to prove an agreement for an exchange of securities whereby the notes in suit were to be surrendered and the notes of the corporation to be substituted; since the answer wholly fails to show that the agreement to substitute the corporation notes had been carried out.

SAME—AMENDMENT OF ANSWER. In such a case it is proper to refuse to allow an amendment of the answer (except upon terms), to the effect that by the above specified agreements it was agreed that the notes in suit should be cancelled; since the proposed amendment and documents taken together constituted no defense to the action, in the absence of an allegation that plaintiff accepted the mining properties mentioned therein, or that the substitution of securities mentioned had been carried out.

¹Reported in 79 Pac. 933.

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Opinion Per RUDKIN, J.

Appeal from a judgment of the superior court for King county, Bell, J., entered May 28, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a chattel mortgage. Affirmed.

John E. Humphries, E. P. Edsen and L. H. Wheeler,
for appellant.

S. D. King, for respondent.

RUDKIN, J.—This was an action to foreclose a chattel mortgage. The plaintiff had judgment below, and the defendant appeals. While numerous errors are assigned, all except two are without merit. These two are, (1) error in excluding certain documentary evidence, offered by the appellant in support of his affirmative defense; and (2) error in refusing to allow an amendment of the answer at the trial, except upon the terms imposed by the court. These two assignments depend upon the construction and effect to be given to the affirmative defense set up in the answer of the appellant. This can best be presented by setting forth the affirmative defense in full. It is as follows:

“That, on or about the date of said mortgage, the plaintiff and E. O. Sauter, H. R. Harriman and J. H. Miracle were associated together and jointly interested in certain business negotiations on one part, and this answering defendant on the other, and the said parties last named, in consideration thereof, entered into an agreement in writing, by the terms of which they were to purchase from this answering defendant and J. F. Bledsoe certain shares of stock in said corporation mentioned in the plaintiff’s amended complaint, to wit: the U. S. B. C. Corporation; and the said notes and mortgage, mentioned in plaintiff’s complaint, were executed to be held by plaintiff in trust for him and his said associates until plaintiff and his said associates would satisfy themselves as to the estate and right of said

corporation in certain lands; that thereafter the said plaintiff and his said associates investigated the said title and rights, and were satisfied with the same, and purchased from this answering defendant certain shares of stock in said U. S. B. C. Corporation, and certain other rights, and entered into certain agreements in respect thereto, and as part of the consideration for said agreement and the said shares, it was, after the said promissory notes and mortgage had been executed, agreed upon, in behalf of the plaintiff and his said associates on one part, and this answering defendant on the other part, that said promissory notes and the whole thereof were fully paid, and satisfied, and that the said mortgage and the rights existing thereunder were fully satisfied and settled, and the same then were fully paid, satisfied and discharged, and thereupon, in pursuance of said agreement, and in consideration therefor, the said promissory notes were by plaintiff and his said associates cancelled, and the said mortgage and all of the rights theretofore existing by virtue of the same were fully satisfied and settled; that thereupon, as a part of said agreement, the plaintiff agreed to deliver the said promissory notes and the whole thereof and the mortgage to this answering defendant, which said agreement the plaintiff and his said associates have wholly violated."

In support of this affirmative defense, the appellant offered in evidence the following documents:

(1) A receipt from the U. S. B. C. Corporation to the respondent for the sum of \$100, in part payment for certain mining stock. This receipt has no bearing upon the case, except it might be inferred, from a document to be considered later on, that this sum of \$100 is a part of the \$700 secured by the mortgage in suit. (2) A written tender made by the respondent to the U. S. B. C. Corporation, J. F. Bledsoe, and the appellant, accompanied by a demand for certain shares of stock and abstract of title to certain mining properties. (3) A written agreement between the U. S. B. C. Corporation and the respondent in relation to certain mining properties. The relevancy or materiality

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of these two latter agreements is not apparent. (4) A written agreement between one J. F. Bledsoe, the appellant, and the respondent. The only part of this agreement pertinent to the questions involved in this case is the following:

"And the said party of the second part [the respondent] agrees to and with said parties, as and for an additional consideration, to secure for the said first parties a loan of six hundred dollars upon the furniture owned by C. E. Crockett [the appellant] as (per schedule) in the office now occupied by the U. S. B. C. Company, the said first parties to give as security therefor, a chattel mortgage upon said property to secure said sum of six hundred dollars, and the further sum of one hundred dollars heretofore paid by the said second party on the said option contract, said loan to be for a period of ninety days; provided, however, that if, upon examination of the titles by the second party, they are accepted and found correct and as represented by 'Exhibit A,' then and in that event the first payment of five hundred dollars made upon said option contract is to be paid upon the note executed for the payment by the said first parties for the loan hereinbefore referred to, and the balance due upon said note to be assumed and paid by second party and considered as part of the second payment."

(5) A written agreement between one J. H. Miracle and the appellant, termed "confidential," relating to the management of the affairs of the U. S. B. C. Corporation. That part of the agreement pertinent to this case is the following:

"That the mortgage and notes given by the said C. E. Crockett [appellant] to R. J. Mahoney [respondent] on the furniture occupied and used by the U. S. B. C. Corporation, shall be cancelled and returned, and that the same shall be sold to the U. S. B. C. Corporation for the sum of one thousand (\$1,000) dollars corporate notes taken therefor; one note to C. E. Crockett in the sum of four hundred (\$400.00) dollars; and two notes to J. H. Miracle, one in the sum of two hundred (\$200.00) dollars and one in the sum of four hundred (\$400.00) dollars."

It is claimed that, in entering into this agreement, the said Miracle represented and acted for the respondent.

Under the terms of the agreement referred to in subdivision 4 of this opinion, it would become the duty of the respondent to pay these notes and mortgage himself, upon the acceptance of the title to certain mining properties therein referred to. Under the most liberal rules of construction, we cannot hold that the answer in question pleads this contract and the happening of the contingency upon which it became the duty of the appellant to pay the notes and mortgage in suit.

Conceding that Miracle represented the respondent in the execution of the agreement referred to in subdivision 5, *supra*, the agreement entered into was neither more nor less than an agreement to exchange securities, to surrender the notes and mortgage in suit, and take in lieu thereof the notes of the U. S. B. C. Corporation in the sum of \$600. If Miracle represented the respondent, when he agreed to surrender the notes and mortgages in suit, he must also have represented him in the agreement to take the corporation notes instead. The answer wholly fails to show that this latter agreement has ever been carried out, and without such allegation, the agreement itself constitutes no defense. The court committed no error, therefore, in sustaining the objection to the introduction of the several documents above referred to.

After the court had sustained the objection, the appellant offered the following amendment:

"Mr. Wheeler: I will ask leave to amend the answer so as to show that, under a contract dated the 27th day of September, 1902, or a certain tender signed by R. J. Mahoney and witnessed by H. R. Harriman, and a certain contract dated the 4th day of October, 1902, signed by J. F. Bledsoe and the U. S. B. C. Corporation, witnessed by H. R. Harriman and J. H. Miracle and signed by R. J. Mahoney, and a certain contract dated the 4th day of

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October, 1902, between J F. Bledsoe and C. E. Crockett as the first parties, and R. J. Mahoney the second party, and signed by J. F. Bledsoe and C. E. Crockett and R. J. Mahoney and witnessed by H. R. Harriman, and a certain contract dated November 27th, 1902, between C. E. Crockett and J. H. Miracle, the said Miracle acting as trustee for R. J. Mahoney, and signed by C. E. Crockett and J. H. Miracle and witnessed by R. J. Harriman and William McLaughlin, that it was agreed that these notes be cancelled and delivered up to the defendant."

The court refused to allow this amendment, except upon terms. No error could be assigned if the court had denied the application to amend absolutely, as the proposed amendment and the documents, taken together, constitute no defense whatever to this action. If these contracts had been properly pleaded, and the answer further alleged that the respondent had accepted the title to the mining properties referred to therein, or had it appeared that the agreement to surrender the notes and mortgage and to take in lieu thereof the notes of the U. S. B. C. Corporation had been carried out, a sufficient defense would be stated; but this court is controlled by the record made in the court below.

As there is no error in that record, the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 5535. Decided February 27, 1905.]

CASSIUS A. PACKENHAM, *Petitioner*, v. C. S. REED, *as Superintendent of the Reform School of the State of Washington, Respondent*.¹

BAIL—INFANT COMMITTED TO REFORM SCHOOL—APPEAL AND STAY OF EXECUTION. An infant convicted of crime and committed to the reform school has a right to be admitted to bail, pending an appeal to the supreme court.

HABEAS CORPUS—TO ADMIT TO BAIL—JURISDICTION OF SUPREME COURT. The supreme court has jurisdiction of a writ of habeas corpus to admit to bail a prisoner who has appealed to the supreme court, and may make an order admitting the applicant to bail; and the fact that the superior court had denied bail and could be compelled by mandate to admit to bail, is no bar to the remedy by habeas corpus.

Application filed in the supreme court February 13, 1905, for a writ of habeas corpus to admit to bail. Granted.

W. W. Langhorne and Vance & Mitchell, for petitioner.

J. R. Buxton and A. J. Falknor, for respondent.

RUDKIN, J.—Original application for a writ of habeas corpus. The facts, as shown by the petition for the writ and the return thereto, are as follows: On the 14th day of January, 1905, the petitioner, an infant of the age of ten years, was convicted, before one of the justices of the peace of Lewis county, of a violation of section 12 of the act of 1903, page 325. The justice of the peace thereupon sent said infant petitioner, together with all papers filed in his office upon the subject, to the judge of the superior court of said Lewis county, as required by Bal. Code, § 2722. On the 21st day of January, 1905, the superior court of Lewis

¹Reported in 79 Pac. 786.

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county orally affirmed the judgment of the justice of the peace, and ordered the petitioner committed to the reform school of the state of Washington, until he should attain the age of eighteen years, or until he should otherwise be legally discharged therefrom. On the 21st day of February, 1905, the superior court issued a commitment, directing the superintendent of the state reform school to take the petitioner into his custody, and him safely keep in said reform school, until he should attain the age of eighteen years, or until he should be legally discharged therefrom. The superintendent of the state reform school now holds the petitioner in his custody by virtue of said commitment.

On the 6th day of February, 1905, the petitioner gave notice of appeal to the supreme court, from the decision and judgment of the superior court, and said appeal is now pending in this court. At the time of giving said notice of appeal, the petitioner applied to the superior court for an order fixing the amount of bail pending said appeal; but the application was denied, for the reason that the petitioner was not entitled to be admitted to bail pending the appeal, in the opinion of the lower court. Upon these facts the petitioner prays that he be discharged from the custody of the superintendent of the reform school, or that he be admitted to bail pending his appeal. The regularity and validity of the proceedings under which the petitioner is held will be determined on the appeal now pending, and the court, on this application, will only consider the right of the petitioner to be admitted to bail pending his appeal.

Bal. Code, § 2726, provides that proceedings in the superior courts, such as were had in the court below, may be reviewed by the supreme court in the manner provided by law for reviewing criminal cases in these courts. Bal. Code, § 6530, provides as follows:

"In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon

an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant."

This court has uniformly given a liberal construction to statutes granting a stay of proceedings on judgments, pending appeals therefrom to this court. *State ex rel. Boom Co. v. Superior Court*, 2 Wash. 9, 25 Pac. 1007; *State ex rel. Bank v. Superior Court*, 12 Wash. 677, 42 Pac. 123; *Fawcett v. Superior Court*, 15 Wash. 342, 46 Pac. 389, 55 Am. St. 894; *State ex rel. Denham v. Superior Court*, 28 Wash. 590, 68 Pac. 1051. And we have no doubt that an infant, convicted of crime and committed to the reform school, has a right of appeal from the judgment and order of commitment, and, incidentally, a right to be admitted to bail pending the appeal. So far as the courts are concerned, there can be no distinction between the constitutional right to bail before conviction, and the statutory right to bail pending an appeal from a judgment of conviction.

The only remaining question is, has the petitioner adopted the proper procedure to obtain the right guaranteed to him by the statute? Under §§ 4 and 6, art. 4, of the state constitution, and Bal. Code, § 5817, writs of habeas corpus may be granted by the supreme court or superior court, or by any judge of either court, and, upon application, the writ shall be granted without delay. Bal. Code, § 5828, provides as follows: "The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions." This statute is simply declaratory of the common law. 15 Am. & Eng. Ency. Law (2d ed.), p. 189. The fact that bail has been denied by the superior court, and that said court might be compelled by writ of mandate from this court to admit the petitioner to bail,

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is no bar to the remedy by habeas corpus. The very fact that a prisoner is compelled to apply for a writ of habeas corpus to admit him to bail, presupposes that bail has already been denied, or fixed in an excessive amount, by some court or officer authorized to take, or admit to, bail in the first instance.

In *Ex parte Croom*, 19 Ala. 651, where a prisoner was denied bail by the circuit judge, it was held to be the proper practice to apply to the supreme court for a writ of habeas corpus to admit to bail. In *Ex parte Good*, 19 Ark. 410, the court says:

"If upon the hearing of an application for bail, the circuit court, or judge, refuse to admit the prisoner to bail, upon a proper application to this court, and showing of the facts upon which the judge acted, if the showing be deemed sufficient, a certiorari would be awarded to bring up a transcript of the papers and proceedings upon the application for bail, for revision, and if it was determined that the prisoner was entitled to bail, this court might bring him before it by habeas corpus, and admit him to bail, or if deemed more convenient, direct the circuit judge, by the proper mandate to do so."

Again, in the same case, the court says:

"The power of revision is to be found in that clause of the constitution which confers upon the supreme court a general superintending control over all inferior and other courts of law and equity; and in furtherance of such superintending and controlling power, to issue writs of habeas corpus, certiorari, mandamus, etc., and to hear and determine the same."

The language of our constitution is:

"The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." Art. 4, § 4.

In *People v. Smith*, 1 Cal. 9, *Ex parte Duncan*, 54 Cal.

75, *Ex parte Smith*, 89 Cal. 79, 26 Pac. 638, and *Ex parte Curtis*, 92 Cal. 188, 28 Pac. 223, the supreme court of California entertained applications for writs of habeas corpus to admit to bail, where bail had been denied by inferior courts, without any question as to its right or jurisdiction to do so. See, also, *Jones v. Kelly*, 17 Mass. 116. So far as our investigations have led us, we have found no case where jurisdiction to admit to bail by habeas corpus has been denied, in the absence of a statute limiting the power of the court in that regard.

For the foregoing reasons, we are satisfied, that the petitioner is entitled to be admitted to bail pending his appeal; that the court has jurisdiction to grant him that right; and that the fact that bail has been denied by the lower court is no bar to the remedy by habeas corpus. It is therefore ordered that the petitioner be admitted to bail in the sum of \$500, pending his appeal to this court, and that, upon filing a good and sufficient bail bond in said sum with the clerk of the superior court of Lewis county, conditioned as by law provided, to be approved by said clerk, the respondent shall discharge the petitioner from the reform school, where he is now detained, pending said appeal, and until the further order of the court. Let the order of discharge issue forthwith, to take effect upon the filing and approval of a proper bail bond.

MOUNT, C. J., DUNBAR, CROW, and HADLEY, JJ., concur.

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Citations of Counsel.

[No. 4989. Decided February 28, 1905.]

SARAH BROCKWAY, *Respondent*, v. T. O. ABBOTT *et al.*;
Appellants.¹

CHATTEL MORTGAGES—RECORDING—POSSESSION OF MORTGAGEE—
—PURPOSE OF TAKING POSSESSION—BAILMENTS—EVIDENCE—CON-
TEMPORANEOUS ORAL AGREEMENT—VARYING TERMS OF WRITING.
Where, at the time of making a chattel mortgage the property
was delivered to and stored by the mortgagee, the mortgagor
claiming a gratuitous bailment, oral evidence is admissible to
show a purpose to hold the goods as a mortgagee in possession
for further security, under a contemporaneous oral agreement not
to record the chattel mortgage, since the taking of possession
was an independent act, and such evidence did not contradict
the terms of the written contract.

SAME—POSSESSION OF MORTGAGEE—CONVERSION—DELAY IN FORE-
CLOSURE. A mortgagee in possession for the purposes of security
is not guilty of a conversion by reason of delaying foreclosure
after condition broken, while the right of foreclosure exists, and
the mortgagor cannot recover the value of the property without
redeeming from the mortgage debt.

SAME—UNRECORDED CHATTEL MORTGAGE—CREDITORS—NOTICE. The
mortgagee of chattels, coming into possession in good faith be-
fore other liens attach, holds against all the world, although the
mortgage is not recorded and creditors have no notice thereof.

Appeal from a judgment of the superior court for Pierce
county, Snell, J., entered August 15, 1903, upon findings
in favor of the plaintiff, after a trial on the merits before
the court without a jury, in an action for the foreclosure
of a chattel mortgage. Affirmed.

Stiles & Doolittle, for appellant T. O. Abbott, contended,
inter alia, that the mortgage gave the right of possession
to the mortgagor. *Pacific Nat. Bank v. San Francisco*
Bridge Co., 23 Wash. 425, 63 Pac. 207; *Ruckman v. Imb-*

¹Reported in 79 Pac. 924.

ler Lumber Co., 42 Ore. 231, 70 Pac. 811. The mortgagee had no right to possession except for the purpose of foreclosure. 5 Am. & Eng. Ency. Law (2d ed.), p. 988; *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008; *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Howery v. Hoover*, 97 Iowa 581, 66 N. W. 772; *Burton v. Randall*, 4 Kan. App. 593, 46 Pac. 326; *Woods v. Garr, Scott & Co.*, 93 Mich. 143, 53 N. W. 14; *In re Haake*, Fed. Cases, No. 5883; *Landon v. White*, 101 Ind. 249; *Hartman v. Ringgenberg*, 119 Ind. 72, 21 N. E. 464; *Case v. Boughton*, 11 Wend. 106; *Davis v. Rider*, 5 Mich. 423. He must foreclose within a reasonable time, and this was not done. *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715, 87 N. W. 544; *Halley v. Kenoyer*, 1 Wash. Ter. (N. S.) 611; 5 Am. & Eng. Ency. Law (2d ed.), p. 1003; Bal. Code, § 4800.

Jesse Thomas, for appellant Swalwell Land, Loan & Trust Co. An unrecorded chattel mortgage is void as against creditors of the mortgagor. Bal Code, § 4558; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867. The mortgage gave the mortgagor the right of possession. *Ephriam v. Keller*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604. And an oral agreement that the mortgagee should hold possession contradicted the written contract. *Pacific Nat. Bank v. San Francisco Bridge Co.*, 23 Wash. 425, 63 Pac. 207; *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646; *Windell v. Readman Warehouse Co.*, 30 Wash. 469, 71 Pac. 56.

John H. McDaniels, for respondent, contended, among other things, that the loan company, claiming under a bill of sale, acquired no rights as a creditor. *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Horn v. Volcano Water Co.*, 13 Cal. 62. As a pur-

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chaser of the property in the possession of the mortgagee it was not protected. *Jones, Chattel Mortgages*, § 309; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867; *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872. A mortgagee in possession under an unrecorded chattel mortgage made in good faith holds against all the world. *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578; *First Nat. Bank v. Anderson*, 24 Minn. 435; *Coty v. Barnes*, 20 Vt. 78.

FULLERTON, J.—On January 9, 1895, the appellant, T. O. Abbott, made and delivered to one S. Warburton his four several promissory notes, three of which, aggregating \$585, were payable to Warburton, and one of which, being for \$990, was payable to the respondent. These notes represented loans which Warburton had theretofore made on behalf of himself and the respondent to Abbott, and \$200 which Warburton advanced him at the time of their execution. The notes were payable two years after date. To secure the payment of the notes according to their tenor and effect, Abbott, at the same time, executed and delivered to Warburton a chattel mortgage upon some seven hundred and ninety-two volumes of a certain publication, known as Abbott's Real Property Statutes of Washington Territory, together with the copyright of the same, and the paper matrices of the original forms from which the books had been printed. This mortgage was made to Warburton and one H. N. Brockway, the husband of the appellant. At the time of the execution of the mortgage, the books and paper matrices were delivered into the possession of Warburton; it being understood between him and the appellant Abbott, that the mortgage should not be recorded. After the maturity of the notes, the same not being paid, Warburton assigned his notes, and his interest

in the mortgage, to the respondent, who had also taken an assignment of the mortgage from H. N. Brockway.

This action was begun in June 1901, some four years after the notes matured. In her complaint the respondent alleged the execution of the notes and chattel mortgage, the delivery of the property to Warburton, the assignment to her by Warburton and Brockway of their interests therein, that no payments had been made thereon, and that there was due upon the notes and mortgage sums aggregating some two thousand three hundred dollars. The prayer was for judgment against Abbott for the amount so due, for a decree foreclosing the mortgage and directing a sale of the mortgaged property, and the application of the proceeds of the sale to the satisfaction of the judgment.

To the complaint Abbott first filed an answer, in which he denied the allegations of the complaint, but asked no affirmative relief. Later on he filed an amended answer, which, in addition to denials, contained affirmative matter to the effect that the mortgaged property was not delivered to Warburton as mortgagee, or as agent for the mortgagee, but as a gratuitous bailee and agent for Abbott, to relieve him of the burden of taking care of the property; and that, some time before the property was put in Warburton's possession, Abbott and wife had given their note to the First National Bank of Everett for \$1,400; that subsequently the note was assigned to the Swalwell Land, Loan & Trust Company; and that on October 8, 1901, (some five months after the commencement of this action), Abbott and wife had given a bill of sale of the property, with covenants of warranty, to the Swalwell Land, Loan & Trust Company, in consideration of the surrender and return of their note; that possession of the property had been demanded of him by the Swalwell Land, Loan & Trust Company, and that he in turn had demanded such

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possession of Warburton, that possession thereof had been refused, and that, by reason of the premises, Abbott had become liable to the Swalwell Land, Loan & Trust Company for the value of the books, which were worth \$7,200, and had been damaged in that sum by the action of the respondent, and prayed for judgment against her for that sum.

About the time this amended answer was filed, the Swalwell Land, Loan & Trust Company obtained leave of court and intervened in the foreclosure action. In their complaint in intervention, they alleged substantially the matters contained in the further and separate answer of T. O. Abbott, demanding judgment against the respondent as for a conversion of the property. Issue was taken on these answers, and a trial had, resulting in a judgment and decree of foreclosure, as prayed for in the complaint.

While the appellant Abbott makes many assignments of error, the only assignment necessary to notice is the one involving the contention that the respondent's acts with reference to the mortgaged property amounted to a conversion of such property, rendering her liable for its actual value. He argues that the respondent is liable, no matter which theory of the evidence is taken; if the goods were taken merely for storage, it was a conversion for the respondent to refuse to return them on demand; and, on the other hand, if they were taken as mortgagee in possession, there was such an unreasonable delay in disposing of them that the law implied a conversion.

The court found against the appellant as to the purpose for which the respondent took possession of the property. It held that she took it as security, becoming a mortgagee in possession, and was not required to deliver it up on demand of Abbott, or any one deriving title through him,

without the payment of the mortgage debt. This finding was abundantly justified by the evidence. Aside from the oral evidence in the record that such was the purpose of the parties, when the property was delivered to Warburton, there was a written agreement made with reference to the withdrawing of individual books, as they might be sold by the mortgagor, which, it would seem, would not have been necessary, or even thought of, had the books not have been held in pledge for the mortgage debt. We have not overlooked the argument to the effect that it was not competent to prove by parol the purpose or which the books were turned over to the mortgagee. But we think such evidence competent. Such evidence in nowise contradicted or varied the terms of the mortgage. The turning over of the property was an independent act, a part of the original scheme to furnish security; and the fact that the mortgage did not especially provide for it did not make the act illegal, or prevent its being proven by the best evidence possible.

The second part of the contention is equally without merit. The possession of the mortgaged property by a mortgagee in possession does not become wrongful immediately upon condition broken, nor during the time the right of foreclosure exists. If the mortgagee actually converts the property, or suffers his right to foreclose to lapse from some other cause, then he becomes liable to account to the mortgagor for the value of the property over and above the mortgage debt. But so long as the property remains intact, and the right of foreclosure exists, the possession of the mortgagee is rightful, and the only remedy the mortgagor has, as against the mortgagee, is to redeem from the mortgage debt; he cannot recover the value of the property because of mere delay in foreclosure.

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The appellant, Swalwell Land, Loan & Trust Co., makes the additional contention that the mortgage is void as to it because not recorded. But this precise point was met and determined adversely to its contention by the late territorial court in *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578. This decision, we think, correctly states the law, and will be followed here.

The judgment appealed from is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5116. Decided February 28, 1905.]

T. D. HINCKLEY *et al.*, Appellants, v. CITY OF SEATTLE,
*Respondent.*¹

STATUTE OF LIMITATIONS—JUDGMENTS—MUNICIPAL CORPORATIONS—STREET ASSESSMENT LIENS—ENFORCEMENT OF, WITHIN SIX YEARS—QUIETING TITLE. A street assessment lien being subject to the statute of limitations, a judgment therefor becomes inoperative for any purpose, under Bal. Code, §§ 5149, 5150, after the lapse of six years, as in the case of other judgment liens.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 30, 1903, upon sustaining a demurrer to a complaint, dismissing an action to remove the cloud of a judgment. Reversed.

Fred H. Peterson, for appellants.

HADLEY, J.—This is an action to remove the cloud of a judgment taken to foreclose a street assessment lien. The city of Seattle recovered the judgment September 7, 1897. This suit was commenced October 17, 1903. The com-

¹Reported in 79 Pac. 779.

plaint avers that more than six years have elapsed since the entry of the judgment, which remains unsatisfied and has not been revived, that no execution has been issued thereon, and that it has ceased to be a lien upon the real estate in question. The city demurred generally to the complaint, on the ground that it does not state sufficient facts to constitute a cause of action. The demurrer was sustained. The plaintiff declined to further plead, and judgment was entered dismissing the action. The plaintiff has appealed.

The sole question is, can the lien of a judgment, entered in a street assessment foreclosure, be enforced after such lapse of time as destroys ordinary judgment liens? Appellants insist that the lien of such a judgment is subject to the same limitation as that of an ordinary judgment. This court has held that a judgment becomes inoperative for any purpose after the expiration of the period prescribed by statute for the duration of its lien. *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831; *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846; *Hardin v. Day*, 29 Wash. 664, 70 Pac. 118. The judgment involved in the case at bar was entered after the act of 1897 took effect. Bal. Code, §§ 5149, 5150. If it is subject to the rule of the above cited cases, then the duration of its lien was six years, and that period expired September 7, 1903. Section 5149, *supra*.

The respondent city has filed no brief, but from appellants' brief we apprehend that respondent's counsel urged the view in the lower court that the lien of a street assessment is perpetual until the amount thereof is paid, as this court has held the general tax lien to be. We cannot concur in such view. The general tax lien was held to be perpetual for the reason that our revenue law declares that the lien shall continue until the taxes are paid. We are

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Syllabus.

not advised of the existence of any such statute relating to street assessment liens. The application of the statute of limitations to the enforcement of assessment liens has been repeatedly recognized by this court. *Spokane v. Stevens*, 12 Wash. 667, 42 Pac. 123; *Ballard v. West Coast Imp. Co.*, 15 Wash. 572, 46 Pac. 1055; *Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234. Therefore, the street assessment lien is not like that of the general tax, but is subject to the statute of limitations, and, when the lien has become merged in a judgment, we know of no reason why it shall not be governed by the rules which apply to other judgment liens. Such was the effect of the decision in *Dorland v. Smith*, 93 Cal. 120, 28 Pac. 812.

For these reasons the judgment is reversed, and the cause remanded with instructions to the lower court to overrule the demurrer.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5492. Decided February 28, 1905.]

THE STATE OF WASHINGTON, *on the Relation of E. K. Pendergast, Appellant*, v. WILL N. FULTON,
Respondent.¹

COUNTY COMMISSIONERS—VACANCY—HOW FILLED. Upon a vacancy occurring in the office of a county commissioner, the two remaining members have power to select a successor, Bal. Code, § 327, providing that the judge of the superior court of the county shall act with them being in conflict with Const. art. 11, § 6, which provides that the county commissioners shall fill vacancies in any county office.

¹Reported in 79 Pac. 779.

Appeal from a judgment of the superior court for Okanogan county, Brown, J., entered December 12, 1904, dismissing a proceeding in *quo warranto*, upon sustaining a demurrer to the information. Affirmed.

E. K. Pendergast, for appellant.

A. W. Barry and *A. J. Laughon*, for respondent.

Crow, J.—In this action the prosecuting attorney of Okanogan county filed an information in *quo warranto*, for the purpose of ousting the respondent, Will N. Fulton, from the office of commissioner of said county. It is alleged that one A. George Wehe had been elected to said office, but afterwards resigned, thereby creating a vacancy. Thereupon the two remaining commissioners, at an adjourned meeting of the board, elected the respondent to fill said vacancy, and said respondent immediately qualified and entered into possession of the office. The contention of relator as set forth in the information, is that, before the two remaining county commissioners proceeded to fill said vacancy, they should have notified the superior judge for Okanogan county, Washington, to act with them, under the provisions of Bal. Code, § 327. It is alleged that no notice of the meeting held to elect a commissioner was given to said superior judge, that said judge took no part in said meeting, and that the election held by the two commissioners was therefore void. A demurrer to the information was sustained. The relator declined to plead further, a judgment of dismissal was entered, and this appeal was taken.

Bal. Code, § 327, reads as follows:

“Whenever a vacancy occurs in a board of county commissioners in any county in this state, either by death, resignation, failure to qualify or otherwise, then at the first regular meeting of the board of county commissioners

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Opinion Per CROW, J.

thereafter, the remaining county commissioners and the judge of the superior court of the county shall appoint some qualified elector to fill the vacancy: Provided, That in any county in which there shall be more than one judge of the superior court, the eldest thereof shall perform the duties herein required."

Bal. Code, § 346, provides that, when a vacancy occurs in any county office, the commissioners of the county in which such vacancy occurs shall appoint a suitable elector of the proper county to fill such vacancy. Section 6, of art. 11, of the constitution of this state, reads as follows:

"The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct, or road district office of such county by appointment, and officers thus appointed shall hold office till the next general election, and until their successors are elected and qualified."

Respondent contends that the requirement of Bal. Code, § 327, whereby it is provided that the judge of the superior court shall act with the county commissioners, in appointing a person to fill a vacancy on the board of county commissioners, is in violation of said § 6, art. 11, and, therefore, unconstitutional and void. We think this contention is correct, and should be sustained. There is no question but that a commissioner is a county officer, and that under the provision of said § 6, art. 11, the remaining members of the board of county commissioners have full authority to appoint a suitable person to fill any vacancy on the board, and that such authority is also granted by Bal. Code, § 346, above mentioned. *State ex rel. McMartin v. Whitney*, 9 Wash. 377, 37 Pac. 473.

The judgment of the superior court is affirmed.

MOUNT, C. J., ROOT, RUDKIN, and DUNBAR, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 5378. Decided February 28, 1905.]

SEATTLE LAND AND IMPROVEMENT COMPANY, *Appellant*,
v. CITY OF SEATTLE *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—PARKS—DIVERSION TO ECONOMICAL USE—LANDS HELD IN FEE AND PAID FOR FROM GENERAL FUND—ABUTTING OWNERS. A city of the first class, being authorized to acquire lands by purchase or otherwise and to dispose of the same, and to establish, regulate, control or vacate parks, and having acquired lands in fee for the purpose of a public park by the right of eminent domain, may thereafter divert the same to an economic use by the erection thereon of a city building, where the lands appropriated were paid for by the city out of its general fund, as distinguished from a restricted donation or conveyance for park purposes, or from a purchase paid for by local assessments levied upon the property specially benefited thereby; and abutting owners can not object to such diversion.

Appeal from a judgment of the superior court for King county, Bell, J., entered July 16, 1904, upon sustaining a demurrer to the complaint, dismissing an action to enjoin certain use of lands appropriated for a public park. Affirmed.

Byers & Byers, for appellant, cited: *Church v. Portland*, 18 Ore. 73, 22 Pac. 528, 6 L. R. A. 259; *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 266; *Seward v. Orange*, 59 N. J. L. 331, 35 Atl. 799; *State v. Laverack*, 34 N. J. L. 201; *Davenport v. Buffington*, 97 Fed. 234, 46 L. R. A. 377; *Rouzee v. Pierce*, 75 Miss. 846, 65 Am. St. 625, 40 L. R. A. 402; *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74; *Belcher Sugar Ref. Co. v. St. Louis Grain El. Co.*, 82 Mo. 121; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *Barney v. Keokuk*, 94 U. S. 324; *Trenor v. Jackson*, 46 How. Pr. 389; *Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 61 Am. St. 185, 38 L. R. A. 849.

Mitchell Gilliam, for respondents.

¹Reported in 79 Pac. 780.

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Opinion Per Root, J.

Root, J.—Appellant brought this action to enjoin the respondents from diverting the use of certain land to another purpose than that for which it is claimed said land was acquired by the city. The material facts are about these: The city duly enacted an ordinance with the following title:

“An ordinance providing for the condemnation and appropriation of certain real estate for the purpose of the construction of retaining walls and slopes thereon, and draining, bulk-heading, piling, surfacing, terracing, and otherwise improving the same, in order to protect certain streets, alleys and highways in the city of Seattle, and to prevent the same from being obstructed, and to use said property, after it is so improved, for a public park.”

Pursuant to this ordinance, the city condemned the land in question, by appropriate proceedings in court. Thereafter, instead of using said premises for a public park, the city authorities decided to erect thereupon an “In-Town Terminal Sub-Station,” to be used in connection with the city’s lighting plant, which use, it is alleged, would be inconsistent with the enjoyment of said lands as a public park, and, in fact, would prevent them from being used as such. The complaint alleges that appellant purchased property directly opposite this proposed park, which it would not have purchased had it not been for the public declaration in said ordinance that the taking of such property was for the purposes of a public park. Respondents demurred to appellant’s complaint, and the demurrer was sustained. Appellant elected to stand upon its complaint, whereupon the trial court made and entered a judgment of dismissal. Appeal is taken from said judgment.

Appellant contends that, inasmuch as the city stated in said ordinance that the condemnation and taking of said property was with the intention of using it ultimately as

a public park, said city has no right to use it for other purposes—at least, not for economic purposes that would prevent its use and enjoyment as a public park.

The ordinance contains no provision for the creation of an assessment district to bear the expense of acquiring said property, or for the payment of the same by means of an assessment upon property which would be specially benefited by the creation of a park out of the lands thus acquired. It will thus appear that the payment for said land so taken must be from the general fund of the city. Cities of the first class have power,

“To acquire, by purchase or otherwise, such lands and other property as may be necessary for any of the corporate uses provided for by its charter, and to dispose of any such property as the interests of the corporation may, from time to time, require.” Bal. Code, § 739 subd. 3.

Such cities are also given power,

“To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve the streets, alleys, avenues, sidewalks, wharves, *parks* and other public grounds, and to regulate and control the use thereof and to vacate the same.” Bal. Code, § 739, subd. 7.

It is doubtless the law that, where a person dedicates or donates to a city a tract of land, with a restriction upon its use—as for instance, where it is so dedicated or donated solely for a park or a public street—the city can not legally divert the use of such property to uses and purposes inconsistent with the purpose of such grant; and, in cases where a city has acquired property for the purpose of a public park, and the payment thereof is made by means of special assessments, levied upon neighboring property specially benefited by reason of the acquiring and using of said property for such purposes, that the owners of said property, thus specially assessed, may in a

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Opinion Per Roer, J.

proper case, prevent such property from being used in a manner that would destroy its use and enjoyment for the purposes for which it was acquired.

But where property is taken, and paid for from the general fund, with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest.

In 2 Dillon, Mun. Corp. (4th ed.), § 651, the author says:

"As between the municipality and the general public, the legislative power is, in the absence of special constitutional restrictions, supreme, and so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the legislature may doubtless direct and regulate the purposes for which the public may use it. . . . In the absence of any restriction by contract or special restriction in the constitution, the power of the legislature over the use of public property—that is, its power to modify and regulate such uses—is undisputed, and so far as the public or municipality is concerned, it is, perhaps, quite unlimited."

In *Brooklyn v. Copeland*, 106 N. Y. 496, 13 N. E. 451, it was held that the legislature could relieve the city of the restriction, and authorize it to sell and convey property theretofore taken for park purposes. Lewis, Eminent Domain, § 596, says:

"Where a fee simple is taken, the weight of authority is that there is no reversion, but when the particular use ceases, the property may, by authority of the state, be disposed of for either public or private uses."

In *McNeil v. Hicks & Howell*, 34 La. Ann. 1090 the supreme court of Louisiana said:

"The doctrine was early declared by this court, that a municipal corporation may alienate or change the use and destination of public places with the consent and by the authorization of the sovereign power first obtained, whenever the public interest may require it."

An examination of the authorities cited by the respective parties hereto, and such others as we have been able to examine, shows that a clear distinction is observed between those cases where the *fee* of the property is acquired (by purchase, condemnation, or otherwise), and those cases wherein the city obtains merely an *easement*; also, between cases where the full purchase price is paid by the city from its general fund, and those cases where the property is *dedicated* or donated for some specific public use, or conveyed with some restriction, or where payment is provided by assessment upon neighboring property specially benefited by the contemplated use.

In the case at bar the city acquired the full and complete legal title in fee to this property, without restriction of any kind; and paid, so far as the record shows, the full value therefor from the general fund. It was not a dedication or donation, or a conveyance to the city with any limitations or restrictions. The city having thus acquired the property, and, in its wisdom, decided thereafter that the contemplated use should be changed, and that its welfare and necessities required a use for economic purposes, we are unable to find any authority authorizing the appellant to interfere with the respondents' actions in this direction. *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Curran v. Louisville*, 83 Ky. 628.

The judgment of the lower court is affirmed.

MOUNT, C. J., RUDKIN, CROW, and DUNBAR, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

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Opinion Per MOUNT, C. J.

[No. 4984. Decided March 1, 1905.]

CHARLES W. CARSON, *Appellant*, v. THE OLD NATIONAL
BANK, *Respondent*.¹

INSTRUCTIONS—CLEARNESS—REASONABLY DEFINITE. Error cannot be predicated upon instructions in that they were not simple, direct and clear upon the principal issue, where there were various issues requiring instruction, and they were reasonably clear and definite and not misleading to the ordinary mind, although not the most simple and direct that might be given.

BANKS—POWER TO SELL NOTE—AUTHORITY OF CASHIER—EVIDENCE—GROUND OF OBJECTION—MATERIALITY. It is not prejudicial error to sustain an objection to oral evidence of the authority of a bank cashier to sell a note of the bank, as not being the best evidence, as it is immaterial in any event, the bank having authority to sell a negotiable note regardless of such authority.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered November 3, 1903, upon the verdict of a jury rendered in favor of the defendant, after a trial on the merits, in an action for conversion. Affirmed.

Thayer & Belt, for appellant.

Foster & Wakefield, for respondent.

MOUNT, C. J.—On December 22, 1896, appellant borrowed \$250 from respondent and gave his negotiable promissory note therefor, due sixty days after date. At the same time, and as collateral security for the payment of the note, appellant deposited with respondent twenty-three shares of stock of the Spokane Falls Gas Light Company. After the note became due, respondent repeatedly demanded payment, but appellant neglected to pay the same or any part thereof. On July 16, 1903, appellant ten-

¹Reported in 79 Pac. 927.

dered to the bank the amount due on the note, and demanded a return of the stock; whereupon he was informed that the bank had long since sold the note, and transferred the stock along with the note. Appellant thereupon brought this action, alleging the giving of the note and security as above stated, and also alleging a tender, on July 16, 1903, of the amount due on the note, and a demand for the gas stock, and that the respondent refused to deliver the same to appellant. It was further alleged that the value of the stock at the last named date was \$4,600. The prayer is for that sum, less the amount due on the note.

Respondent answered the complaint, and admitted the making of the note and the collateral security, and set out a copy of the note; admitted the tender, but denied the value of the collateral security to be more than \$250. As an affirmative defense, the answer alleged the insolvency of the appellant at the time the note became due; that respondent demanded payment of the note; that appellant refused to pay the same; that thereupon respondent sold the note to one Aldrich for the amount due thereon; and also alleged a transfer of the note and security to said Aldrich. Appellant for reply denied the affirmative defense. The cause was thereafter tried to the court and a jury, and a verdict was returned in favor of the respondent.

Appellant assigns many errors upon the instructions given by the court to the jury. Except technical objections, which are not necessary to be passed upon, appellant's main argument is that the issue was simply whether or not the bank had sold the note and transferred the security to Aldrich, and that the instructions of the court were not simple, direct, and clear upon this point. It is true that the dispute as to the sale of the note was the most important issue in the case, but there were other issues.

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The form of the note set out in the affirmative answer was denied by the pleadings, and was disputed by the appellant in the evidence. A question of notice to the appellant was also raised in the evidence, and the value of the securities was questioned. The court instructed upon all these points, as it was its duty to do. Without setting out the instructions here, we think it is sufficient to say that they were reasonably clear and definite, and that there was no error in this respect. It is not required that judges shall give instructions which are the most simple and direct that may be given in a case. If the instructions are such as are readily understood, and not misleading to the ordinary mind, they are sufficient. The ones given in this case are clearly within this rule.

Appellant further complains because the court sustained objections to questions propounded upon cross-examination of respondent's witness Vincent, who was cashier of respondent bank. Some of these questions were as follows: "Did you have any authority to sell notes for the bank?" "What was it Mr. Glidden had authority to do that you did not have authority to do?" Objections were made to these, and other questions of similar import, upon the ground that it was not the best evidence. If it is conceded that this was not a proper ground upon which to sustain the objections, the court was clearly right in excluding the evidence, because it was entirely immaterial. The note was negotiable, and therefore the bank had a perfect right to sell it without regard to the authority of the officers. The error, if it was error, was harmless.

There is no error in the record. The judgment is affirmed.

HADLEY, FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5469. Decided March 1, 1905.]

D. P. WAIT, *Appellant*, v. ROBERTSON MORTGAGE
COMPANY *et al.*, *Respondents*.¹

NEW TRIAL—DISCRETION—REVIEW ON APPEAL. Upon granting a new trial solely on the ground that the verdict was excessive, the trial court must exercise its discretion, and the only question on appeal is whether the discretion has been abused.

SAME—MALICIOUS PROSECUTION—INQUISITION OF LUNACY—EXCESSIVE DAMAGES. In an action for prosecuting a malicious inquisition of lunacy, wherein the plaintiff was arrested and confined until the following day, and in which the testimony disclosed no injury to plaintiff's person or health, it is not an abuse of discretion to grant a new trial on the ground that a verdict for \$1,916 was excessive.

EXCESSIVE DAMAGES—REMISSION OF EXCESS OR NEW TRIAL ABSOLUTELY—APPEALABLE ORDER. In an action to recover unliquidated damages for a malicious prosecution, in which the jury return an excessive verdict, the question whether the excess shall be remitted or a new trial granted absolutely, is addressed solely to the discretion of the trial judge, and no appeal lies from the exercise thereof.

Appeal from an order of the superior court for King county, Morris, J., entered July 8, 1904, setting aside a verdict as excessive and granting a new trial. Affirmed.

L. T. Turner, for appellant, to the point that the verdict was not excessive, cited: *Jones v. Jenkins*, 3 Wash. 17, 27 Pac. 1022; *Ross & Co. v. Innis*, 35 Ill. 487, 85 Am. Dec. 373; *Clarke v. American Dock etc. Co.*, 35 Fed. 478; *Gulf etc. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. 743.

Peters & Powell, for respondents.

RUDKIN, J.—The complaint in this action alleges that the defendants, without any probable cause therefor,

¹Reported in 79 Pac. 926.

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wrongfully and maliciously caused a charge of insanity to be preferred against the plaintiff, upon which the plaintiff was arrested, examined, and discharged. The trial resulted in a verdict in favor of the plaintiff in the sum of \$1,916. The court in which the verdict was returned granted a new trial, upon the sole ground that the verdict was excessive. From the order granting a new trial, this appeal is taken.

The appellant contends that the sufficiency of the evidence to sustain the verdict of the jury is the only question before this court. On the other hand, the respondents contend that an abuse of discretion in granting the new trial is the only question before us. Manifestly the theory of the respondents is the correct one, as such questions are always addressed to the sound discretion of the trial court, and an appellate court will only interfere with the exercise of that discretion where an abuse is shown. *Hughes v. Dexter Horton & Co*, 26 Wash. 110, 66 Pac. 109. In *McLimans v. Lancaster*, 57 Wis. 297, 15 N. W. 194, the supreme court of Wisconsin says:

"The judge before whom the cause was tried heard the testimony, observed the appearance and bearing of the witnesses and their manner of testifying, and was much better qualified to pass upon the credibility and weight of their testimony than this court can be. There are many comparatively trifling appearances and incidents, lights and shadows, which are not preserved in the record, which may well have affected the mind of the judge as well as the jury in forming opinions of the weight of the evidence, the character and credibility of the witnesses, and of the very right and justice of the case. These considerations cannot be ignored in determining whether the judge exercised a reasonable discretion or abused his discretion in granting or refusing a motion for a new trial."

Inasmuch as the case must be re-tried in the court below, any comment on the facts, except so far as they are

undisputed, would be improper. It appears that the charge of insanity was preferred against the appellant on the 11th day of May, 1903. The appellant was arrested on that day, and confined in the hospital ward of the county jail until the following day, when he was examined and discharged. The testimony disclosed no injury to the person of the appellant, no injury to his health, and no injury to his property or business. In other words, the only resultant injury was such as would reasonably and necessarily follow from such a charge, and from the ensuing arrest and examination. The damages in such cases cannot be measured by any fixed rules. Damages resulting from mental suffering, injured feelings, wounded pride, and the like, are so intangible in their nature, so incapable of accurate estimate, and so dependent upon the surrounding circumstances, that this court would be reluctant to interfere with the exercise of the discretion vested in the trial court, unless a clear abuse were shown. The reasons for this rule apply with special force in this case. The court below saw the plaintiff, heard him testify, observed his demeanor, knew his temperament and disposition, and, in the very nature of things, had opportunities of which this court is wholly deprived to judge of the merits of his cause and the extent of the damages suffered by the wrongs complained of.

The appellant further contends that the court below, instead of granting a new trial, should have required the appellant to remit a part of the verdict, if deemed excessive. Where the amount of the excess in a verdict can be ascertained with certainty from an inspection of the record, this is perhaps true. But in actions like this, to recover unliquidated damages, the question whether a new trial shall be granted absolutely, or whether the prevailing party shall be required to remit a part of an excessive ver-

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dict, is addressed solely to the discretion of the trial judge, and, from the exercise of that discretion in granting a new trial absolutely, no appeal lies to this court.

There is no error in the record, and the order granting a new trial is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ.,
concur.

ROOT and CROW, JJ., took no part.

[No. 5158. Decided March 1, 1905.]

W. H. KIRWIN *et al.*, Respondents, v. THE WASHINGTON
MATCH COMPANY *et al.*, Appellants.¹

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CORPORATIONS—CONTRACTS—TRUSTEES—AGENTS—RATIFICATION BY STOCKHOLDERS—STATUTES—CONSTRUCTION. The statute providing that the powers of a corporation shall be exercised by its board of trustees is not exclusive, and a contract made by agents, which was within the powers of the corporation, may be ratified at a stockholders' meeting so as to become a binding obligation.

SAME—ACCEPTING BENEFITS OF CONTRACT—ESTOPPEL. Where money is received and used for the benefit of a corporation by its executive officers who were also trustees, the corporation ratifies the contract under which the money was paid, and is estopped to deny the authority of its agents to make the same.

Appeal from an order of the superior court for Pierce county, Huston, J., entered December 18, 1903, after a hearing on the merits before the court without a jury, appointing a receiver during the pendency of the action. Affirmed.

H. E. Foster, for appellants.

J. W. A. Nichols and John C. Stallcup, for respondents.

¹Reported in 79 Pac. 928.

MOUNT, C. J.—The statement of facts in this case was stricken at the hearing. The only question now remaining in the case for our consideration is the sufficiency of the complaint to state a cause of action. The complaint alleges, in substance, that on the 3d day of April, 1903, plaintiffs entered into a contract with certain agents acting for and on behalf of The Washington Match Company, a corporation, by the terms of which contract plaintiffs agreed to advance to said company \$15,000, for which certain security was to be given; that, under said contract, plaintiffs furnished to said company the sum of \$3,000, which money was received and used by the said company, by and under the direction of the general manager and the president thereof;

“that, prior to the time of paying the said money, these plaintiffs, at a stockholders’ meeting of said corporation, duly presented and submitted to said meeting the contract aforesaid, for ratification or rejection, and at said meeting, by a vote of said stockholders, the said contract was ratified and approved as the contract of the said company, and all moneys furnished, and to be furnished, by these plaintiffs, under such contract, and the indebtedness thereby incurred, was assumed as and for the indebtedness of said company, and by it decreed to be repaid to these plaintiffs;”

that the said ratification was duly entered and spread upon the records of the said corporation. The complaint also alleges, that the contract has been by the defendants forfeited, and that the representations by which plaintiffs were induced to enter into the contract were false and fraudulent; that the corporation is insolvent; and that the property thereof is being dissipated. The prayer is for judgment for the money furnished the corporation, and for the appointment of a receiver.

The only point which appellants attempt to make

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against the complaint is that the action of the stockholders, in ratifying the alleged contract, was void, for the reason that "the corporate powers of a corporation shall be exercised by a board of not less than two trustees, who shall be stockholders in the company" (Bal. Code, § 4255); and that "a majority of the whole number of trustees shall form a board for the transaction of business" (Bal. Code, § 4257). While it is true that the powers of the corporation shall be exercised, under the statute, by a board of trustees, we think this power is not lodged exclusively in such board, so as to prevent a ratification by the stockholders of a contract within the powers of the corporation to make. The general rule is that "a corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance." 10 Cyc. p. 1069. There is no claim made here that the corporation itself, by its board of trustees, was incapable of making the contract in question. The trustees themselves were stockholders in the corporation and, presumably at least, assented to the ratification by the stockholders.

The complaint is sufficient upon another principle. It alleges that the money was received from plaintiffs, and used for the benefit of the corporation, by its executive officers, who were also trustees.

"A leading principle in the law relating to this subject is that where a contract is made by one assuming to act in behalf of a corporation, and for a purpose authorized by its charter, and the corporation, after knowledge of the facts attending the transaction is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies the unauthorized act and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming in whole and not in part; that it cannot disaffirm so much of the unauthorized act as is onerous, while retaining so much

of it as is beneficial; that it cannot keep the advantage, while repudiating the burden; that it cannot disaffirm the contract, while keeping the consideration." 10 Cyc. p. 1078.

Under this rule, it was not necessary for the complaint to allege a ratification by the stockholders. The allegation that the money was received and retained, and used for the benefit of the corporation, by the executive officers thereof, was sufficient.

The judgment is affirmed.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4860. Decided March 3, 1905.]

J. L. FOSTER, *Respondent*, v. PIONEER MUTUAL
INSURANCE ASSOCIATION, *Appellant*.¹

INSURANCE—FALSE STATEMENTS IN APPLICATION—FRAUD OF AGENT—IGNORANCE OF INSURED—WARRANTY. A fire insurance policy is not void by reason of false statements contained in the application, inserted by the agent without the knowledge of the insured, where the exact truth was stated to the agent, and the insured signed the application relying upon the agent's statement that it was correct, and had no actual knowledge of limitations upon the agent's authority, or of a warranty clause printed in small type in the application.

SAME—POLICY—CLAUSE REQUIRING WRITTEN AUTHORITY—SOLICITOR AGENT OF COMPANY—KNOWLEDGE OF. A provision in a policy of insurance to the effect that no person unless authorized in writing shall be deemed the agent of the company, does not make a solicitor the agent of the insured, but he is the agent of the company, and his knowledge of matters material to the risk becomes the knowledge of the company.

SAME—LIMITATION UPON AUTHORITY OF AGENT—NOTICE TO INSURED—STATEMENTS OF AGENT. A clause in an application limiting

¹Reported in 79 Pac. 798.

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Citations of Counsel.

the authority of an insurance agent in respect to statements not contained in the application, does not charge the insured with knowledge of such limitation, where it is printed in very small type, and the insured in good faith pays for the insurance through the same agent, in reliance upon statements of the agent not contained in the application.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered April 8, 1903, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a policy of fire insurance. Affirmed.

Whitson & Parker and *Granger & Heifner*, for appellant. The insured was bound to take notice of the limitations upon the authority of the agent, who was a mere solicitor, and not authorized to bind the company. *Nixon v. Travelers' Ins. Co.*, 25 Wash. 254, 65 Pac. 195; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114, 3 N. W. 313; *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168, 19 Am. Rep. 490; *Wilkins v. State Ins. Co.*, 43 Minn. 177, 45 N. W. 1; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *Cleaver v. Traders Ins. Co.*, 65 Mich. 527, 32 N. W. 660, 8 Am. St. 908; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa 457, 57 N. W. 952, 48 Am. St. 454; *Northern Assur. Co. v. Grand View Bldg. Ass'n.*, 183 U. S. 308, 22 Sup. Ct. 133.

Henry J. Snively, for respondent, cited: *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Cole v. Union Cent. Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201; *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266, 36 Atl. 389, 56 Am. St. 412; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. 216; *Royal Neighbors*

etc. v. Bowman, 177 Ill. 27, 52 N. E. 264, 59 Am. St. 201; *Mailhoit v Metropolitan Life Ins. Co.*, 87 Me. 374, 32 Atl. 989, 47 Am. St. 36; *Creed v. Sun Fire Office*, 101 Ala. 522, 14 South. 323, 46 Am. St. 134, 23 L. R. A. 177; *Follette v. Mutual Accident Ass'n.*, 110 N. C. 377, 14 S. E. 923, 28 Am. St. 693, 15 L. R. A. 668; *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. 206; *Bebee v. Hartford Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Lycoming Mut. Ins. Co. v. Schollenberger*, 8 Wright (44 Pa. St.) 259; *Beal v. Park Fire Ins. Co.*, 16 Wis. 257; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa 276; *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 88 Am. St. 625; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *Taylor v. Anchor Mut. Fire Ins. Co.*, 116 Iowa 625, 88 N. W. 807, 93 Am. St. 261, 57 L. R. A. 28.

HADLEY, J.—This is a suit to recover for loss by fire. The defendant, an insurance company, issued a policy of insurance to plaintiff, covering his dwelling house and personal property therein, including an organ. The written application signed by the insured stated, by way of answers to printed questions therein, that the chimneys and flues of the house were constructed of brick; that the applicant was the sole owner of the land upon which the building stood; and that none of the personal property insured was incumbered by chattel mortgage, bill of sale, pledge, or otherwise. The truth was the flues were not made of brick, the land was held by the insured under contract of purchase upon which payments had been made, and the organ was also held by him under conditional sale, the principal portion of the purchase price having been paid.

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The issue was made in the pleadings and evidence, that the insured stated to the agent of the company the exact truth, in relation to all of the above matters, when the application was filled out and signed; that the agent wrote the answers, and that neither the answers nor the application were read over by the applicant he being unable to see to read without great difficulty on account of the absence of his eye-glasses; that, relying upon the assurance of the agent that the application truthfully stated the facts, as they had been given to the agent, the insured signed the application. The above was denied, both in the pleadings and evidence. The cause was submitted to a jury, and a verdict was returned for the plaintiff. From a judgment entered upon the verdict, the insurance company has appealed.

Specified assignments of error relate to the following: (1) The denial of appellant's motion for judgment upon the pleadings; (2) the overruling of its objection to the introduction of any testimony; (3) the denial of its motion for judgment at the close of plaintiff's testimony; (4) the instruction to the jury to the effect that appellant was bound, if its agent had knowledge of the facts at the time of the application and issuance of the policy, and if the insured had no knowledge of any limitations upon the agent's authority. The questions raised by the above may be discussed together. On the face of the blank form of application, printed in very small type, was the following:

"The applicant agrees that each of the foregoing questions are correctly answered, and that such statements, answers and valuations are true and a warranty on his part; that the accepting of this risk and the issuing of a policy of insurance thereon is based solely upon the application, and the association shall not be bound in any respect by any act done or statement or agreement made

to or by any solicitor, agent, or other person which is not contained in this application.”

Appellant contends that the above constituted notice to respondent of the limitations upon the authority of the agent. It is urged that, inasmuch as he signed the application, he was bound to know its contents, and that he therefore had knowledge that appellant would not be bound by any statements made by him to the agent, even though truthful, if they were not contained in the application. Whatever may be said of the rule applying under similar circumstances to ordinary written contracts, it must be conceded that there is conflict of authority upon this subject, in relation to contracts made with insurance companies through the medium of agents. It is a matter of common knowledge that the business of soliciting insurance is largely done through agents at places generally remote from the location of the insuring company. The people are, as a rule, not informed concerning the technical rules governing insurance contracts. In the nature of things, they must and do rely largely upon the agents, not only because of the latter's superior knowledge upon the subject, but, also, because they regard the agents as coming from their principals clothed with authority. For these reasons the cases are numerous which hold that, when an agent acts with knowledge of the facts, he is the agent of the insurer, and that his knowledge becomes, in law, that of his principal, and binds the latter when the insured has no knowledge of the limitations upon the agent's authority.

Appellant, however, cites authorities to the effect that, where an application contains upon its face a statement of the limitations upon the agent's authority, the insured is thereby informed, and should be held to have knowledge, thereof. We shall not review these authorities, in view of

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the conflict between them and others, including our own cases, and will confine our references to our own decisions. In *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877, it was held that knowledge, on the part of an authorized agent of the insurance company, becomes, in law, the knowledge of the company, whether communicated to it or not. In *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, the former case was approved, and the court enlarged upon the principle with emphasis. In that case the policy contained a provision that it should be void, if the interest of the assured were other than unconditional and sole ownership. The fact was that the insured property stood upon leased land. It was established that the agent who received the application was, at the time, fully informed as to the ownership and condition of the title. The policy also contained the following: "In any matter relating to this insurance no person, unless authorized in writing, shall be deemed the agent of this company." It was contended that, by reason of the above, the solicitor became the agent of the insured, instead of the insurer. It was held otherwise. The only difference in principle between that case and the one at bar is that there was, in the former case, no written application containing questions and answers, together with a statement relative to the agent's limitations, but the limitations were stated in the policy. The court, however, referred to the absence of such written application, and expressed the view that, even when such application is made, "the courts have almost universally held that, where the assured gave proper answers to the questions, and the agent who acted as the scrivener wrote them down falsely, the company could not on that account escape its liability in case of damage." Authorities upholding the above doctrine were there cited, and the assent

of this court was given thereto, although it was admitted there is conflict of authority upon the subject. The above cited cases were approved in *Cole v. Union Cent. Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201, and *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610, 63 Pac 505.

Appellant, however, cites *Nixon v. Travelers' Ins. Co.*, 25 Wash. 254, 65 Pac. 195, and argues that it departs from the former cases. We think not. The prior cases were there cited and distinguished from the one then under consideration. It was shown that the assured had actual knowledge of the limitations upon the agent's authority to waive time for payment of the premium, for the reason that, after time for payment of one premium installment had passed, he was required to make application direct to the company for reinstatement. Moreover, two of the judges concurred in the result of that case expressly on the ground that actual knowledge on the part of the assured was shown and that they did not intend to depart from the doctrine of the former cases. Respondent calls our attention to many cases in harmony with our own herein cited, and expressly supporting the rule that, when true answers are, in good faith, made by an assured, and false ones are written into the application by an agent, who knows the facts, but so written without the actual knowledge of the assured, and without actual knowledge of the limitations upon the agent's authority, such agent, in so doing, acts as the agent of the insurer, and the latter is estopped to deny its liability.

Appellant contends that the person who filled out the application was only a solicitor, and was not an agent authorized to accept insurance. The same point was made in *Hart v. Niagara Fire Ins Co.*, *supra*, wherein it was sought, by reason of a provision in the policy to establish that no one was to be deemed an "agent" unless authorized

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in writing. The court, however, made clear its view that, under the well-understood definition of agency, the solicitor of an insurance company is, in law and in fact, the agent of the company, and that "it should not be allowed to escape its responsibilities by a simple device of words, which flatly contradict the true meaning of the contract." If insurance companies desire to so limit the authority of such agents, they must bring actual knowledge thereof to the insured.

In the case at bar, the words in the printed application, which are relied upon as charging knowledge to the insured, are in such small type that the ordinary man would not be likely to read them, unless his attention should be especially directed to them. While they appear not far above the signature, yet they are the least conspicuous of any printed matter upon the page, and the average man might reason therefrom that they are of the least importance. An insurance company should first set the example for its agents by making such an important subject conspicuous in its printed matter, and the temptation of the agent to conceal would thereby be lessened. Moreover, the full import of the words would doubtless not be grasped by many minds, without explanation. It is true, when an agent does not see that an applicant is fully informed as to the limitation upon the agent's authority, and then deliberately falsifies the answers in an application, without the knowledge of the applicant, he of course perpetrates a fraud upon his company. Looking, however, at the relative positions of the insured and the insurer, it seems just, under such circumstances, that when the applicant has acted honestly, and has in good faith paid his money for protection by insurance, which money has been received by the insurer through the same agent, the insured ought not to be the sufferer.

The facts of this case have been settled by the verdict of a jury in favor of respondent. For the foregoing reasons we think they are sufficient to sustain the verdict. We find no error in the instructions. The issues were fairly submitted, and the law of the case within the above views clearly stated. The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 4457. Decided March 3, 1905.]

MARY C. CAUGHEY *et al.*, Appellants, v. GEORGE E. RIEN
et al., Respondents.¹

APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—CERTIFICATE—OBJECTIONS TO EVIDENCE IN CASE TRIABLE DE NOVO. As a statement of facts in an equity case must bring up all the evidence in order to review the same *de novo*, a statement is insufficient where it appears from the certificate that it does not contain the objections to questions propounded to witnesses upon the taking of depositions, nor the rulings of the trial court thereon, since it does not appear upon what competent evidence the case was submitted.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered March 10, 1902, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for partition. Affirmed.

Barnes & Latimer, for appellants.

Danson & Huneke and *Nash & Nash*, for respondents.

PER CURIAM.—In this case respondents have interposed a motion to strike the statement of facts, and to affirm

¹Reported in 79 Pac. 925.

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the judgment of the lower court, on the ground that the said statement is not certified as by law required, and does not enable this court to ascertain what evidence is proper to be considered on this appeal. From the record it appears that the appellants filed and served a proposed statement of facts in due time, and that, upon objections being made thereto, the trial judge refused to settle and certify the same as proposed. Thereupon, appellants, by permission of the court, submitted amendments to said proposed statement. To this, respondents objected, and moved to strike the statement, which motion appears to have been granted; but, finally, the trial judge signed a certificate, wherein he certifies that the statement of facts, as it comes here, "contains all the materials, facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record therein, *except the objections made by the defendants to the interrogatories contained in the depositions hereto annexed, and the rulings of the court in passing upon said objections, and in passing upon the objections made to said interrogatories at the time they were propounded to the witnesses during the taking of said depositions.*"

It will thus be observed that the character of this certificate makes it impossible for this court to ascertain how much of the depositions in question can properly be considered on this appeal. This being an equity case where the findings are excepted to, it is necessary for all of the evidence to be here in order that the case may be tried *de novo*; and we are authorized to thus try the case only upon the competent evidence before us. From this record we cannot tell how many of the questions in the depositions were objected to. Where an objectionable question is answered without any objection being interposed, it is, ordinarily, the rule that the objection which might have been urged is thereby waived, and the answer to such

question becomes competent evidence, which must be considered by the court. On the other hand, where an objectionable question is propounded and the opposing party interposes a timely and proper objection, the answer given to such a question, although reduced to writing and returned by the person taking the deposition, does not become competent evidence, and cannot be considered by the court, unless such objection be withdrawn or waived on the trial. Hence, the absolute necessity of knowing what objections were made, upon the trial, to the questions that had been submitted to witnesses, when their depositions were taken prior to the trial, becomes perfectly plain.

The record and statement of facts show that much testimony of numerous witnesses was taken upon depositions, wherein interrogatories were propounded, and the answers received and returned, regardless of objections at the time interposed by defendants. As the record does not disclose what was done with these objections at the time of trial, and does not reveal what other objections were made, or what disposition was made of them, we are unable to segregate the competent from the incompetent evidence—we are unable to ascertain what evidence in this record we are authorized by law to examine. This being true, it is, of course, apparent that we are in no position to determine whether or not the findings and conclusions of the trial court were erroneous, inasmuch as we have no legal basis on which to determine what were the established facts. This court has repeatedly held that it cannot review an equity case, where exceptions are taken to the findings, without having before it all of the evidence upon which the case was tried in the lower court. *Stenger v. Roeder*, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211; *Wheeler v. Lager*, 3 Wash. 732, 29 Pac. 453; *Cadwell v. First Nat. Bank*, 3 Wash. 188, 28 Pac. 365; *Bartlett v. Reichenecker*, 6

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statement of Case.

Wash. 168, 32 Pac. 1062; *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362.

The motion to strike the statement of facts must prevail; and, as no attack is made upon the sufficiency of the answers, the judgment and decree of the lower court must be affirmed, and it is so ordered.

[No. 5478. Decided March 4, 1905.]

JAMES F. CONNER, *Respondent*, v. JAMES M. CLAPP *et al.*,
Appellants.¹

37	299
388	46
37	299
342	643

MORTGAGES—ADVANCE TO PURCHASE PROPERTY—ABSOLUTE DEED WITH BOND FOR DEED—REFORMATION. Where the plaintiff held an option for the purchase of property and applied to the defendants for a loan secured by mortgage thereon, which was refused, but defendants did advance the money except \$1,000, upon a deed executed to them, and gave plaintiff a bond for a deed in consideration of said sum of \$1,000 which was advanced by the plaintiff, the transaction is not a mortgage whereby the land is held as security for the advance, and plaintiff is not entitled to redeem therefrom as such, and this, independently of whether the bond for a deed imposed the obligation on him to repay the advance.

SAME—APPEAL AND ERROR—DECISION—THEORY OF TRIAL—REMAND—PLEADINGS—AMENDMENT AFTER REVERSAL. In an action to have a deed to defendants and a bond for a deed to plaintiff, declared a mortgage, in which action the rights of the plaintiff were tried upon the mortgage theory, the supreme court is unable to determine the plaintiff's rights under his bond for a deed, and, in reversing the case, will remand with directions to have such rights determined under amended pleadings without the commencement of another action.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 23, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing an absolute deed to be a mortgage. Reversed.

¹Reported in 79 Pac. 929.

J. B. Bridges and Ben Sheeks, for appellants.

C. M. Hodgdon and S. M. Heath (*G. C. Israel*, of counsel), for respondent.

RUDKIN, J.—On the 14th day of February, 1901, one Andrew Bruce was the owner of the property in controversy in this action. On that day Bruce, in consideration of the sum of \$950, granted the plaintiff in this action an option to purchase said property, upon the payment of the sum of \$6,500, at any time within ninety days from the date of the option. On the date of the expiration of this option, the property in question was conveyed by warranty deed from Bruce to defendant J. M. Clapp, and on the 16th day of July, 1901, the defendants Clapp and wife executed to the plaintiff a bond for a deed, whereby said defendants agreed to convey said property to the plaintiff in this action, provided he should pay them therefor the sum of \$6,500, on or before the 1st day of December, 1901. This action was brought for the purpose of declaring the deed to J. M. Clapp, and the bond for a deed from Clapp and wife to the plaintiff, a mortgage, and to enforce the right of redemption. The plaintiff had judgment in the court below, and the defendants Clapp and wife appeal therefrom.

The principal question involved in this appeal is this, was the deed from Bruce to J. M. Clapp, and the bond for a deed from Clapp and wife, intended as a mortgage, or given as security for the payment of a debt, or were they what they purported on their face to be? Before a deed absolute in form can be declared to be a mortgage, it must appear that such was the intention of the parties thereto, and that such intent existed at the time of the execution of the instrument, or that the deed was given as security. There is no substantial conflict in the testimony as to what transpired prior to the execution of the deed in question.

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The conflict relates to conversations had, or admissions claimed to have been made, subsequent to the execution of the deed.

The facts are substantially these: The respondent had an option to purchase the property in question, which would expire on the 14th day of May, 1901. Some two weeks prior to that date, he applied to one Stockwell to obtain a loan for him from one Weinhard, of Portland, Oregon, to enable him to take up the option before it expired. Stockwell failed in this, and the respondent likewise failed in his efforts to obtain the necessary funds from other parties with whom he had been negotiating. Stockwell spoke to the appellant J. M. Clapp about the matter some time prior to May 14, 1901, but said appellant refused absolutely to make a loan on the property, or to take a mortgage thereon, as the property was already incumbered by a prior mortgage in the sum of \$3,500. The appellant J. M. Clapp intimated, however, that, if his wife were willing, he might advance the money himself and take a deed to the property in his own name, and execute a bond for a deed to the respondent for a period of six months, provided the respondent would advance the sum of \$1,000 on account of such bond for a deed. Stockwell informed the respondent of this offer, but it was not satisfactory to him, and he continued his efforts to raise the funds elsewhere. Two days before the expiration of the option, the respondent notified Stockwell to obtain the money from the appellant J. M. Clapp, on the terms which he had theretofore intimated. Stockwell applied to the appellant J. M. Clapp, and said appellant sent him the sum of \$2,000, to be applied on the purchase. Stockwell advanced for the respondent the sum of \$1,000, which the respondent was to pay the appellants on account of the bond for a deed. These two amounts, together with the mortgage

of \$3,500 already against the property, made up the purchase price of \$6,500. \$3,000 was paid to Bruce, and a deed executed to the appellant J. M. Clapp, on the 14th day of May, 1901, and on the 16th day of July, 1901, the appellants executed a bond for a deed to the respondent as heretofore stated. The deed to the appellant J. M. Clapp, and the bond for a deed from the appellants Clapp and wife to respondent were in fact a part of the same transaction, though executed on different dates. No communication of any kind passed between the appellants and the respondent, prior to the payment of the money and the execution of the deed. All negotiations were conducted between the respondent and Stockwell on the one hand, and between Stockwell and the appellant J. M. Clapp on the other. There is some question between counsel as to whom Stockwell represented in these negotiations. Unquestionably Stockwell was the agent of the respondent, in his efforts to obtain the money to take up this option. There is nothing in the record to show that Stockwell was the agent of the appellants, or represented them in any way, up to the time the money was paid over and the deed obtained from Bruce. The letter transmitting the money, under date of May 14, 1901, is as follows:

"Westport, Wash., May 14, 1901.

"Mr. A. P. Stockwell, Aberdeen, Wash. Dear Sir:— Inclosed are two checks of mine, one on P. S. Nat. Bank of Seattle, \$400; one on Standard Bank of Canada, \$1,600; total, \$2,000; made payable to your order and are to be applied in the matter of the Bruce & Lamb property purchase. As I am unable to be in the harbor on this date I leave this solely to you, and of course shall expect you will guard my interests as your good judgment may direct. The above amount, \$2,000, is given for a deed to the Bruce and Lamb corner in Hoquiam spoken of, with the understanding that the only indebtedness against it at the time deeds are made out is a mortgage held by Peter Autzen

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of Hoquiam, principal and interest on which does not exceed \$3,500. As stated by you, Autzen desires that \$1,000 be paid him as soon as deeds are executed. This I will be able to do in course of a month or six weeks when new mortgage can be made out.

"I am willing to execute a bond for deed to James Conner, or to whom he may direct, for a period not to exceed six months, provided he puts up a thousand dollars for the privilege; (this I understood you to say you would arrange for him) and you are hereby authorized to have the necessary papers prepared and I will so execute them. Should Conner not purchase at the end of six months, I will be willing to refund his thousand dollars by allowing him to pay me a rental equivalent of one-half the real rental, until the \$1,000 will have been absorbed, say at the rate of \$50 per month. In the mean time Conner is to pay all assessments which may be levied against the property, and to pay all taxes. He is also required to pay for the insurance against fire, for an amount consistent with the rules adopted by insurance companies as a limit to be carried.

"I think the rate of 10 per cent required by Autzen rather high, especially as the mortgage will have been reduced by nearly 30 per cent and the security for his \$2,500 ample to warrant a reduction of interest; however if he insists I will pay 10 per cent for the six months, and by that time will have made arrangements to get a new long time loan, provided Conner does not live up to the terms of the bond. I will try Arch Campbell, and it may be that I can get the funds from him and pay Autzen off right away. I understand Campbell loans money at 8 per cent.

"The above enumeration of conditions is simply a rehearsal of our conversation and agreement as I understood them, and are here outlined to state my acceptance and yours, acting for Conner, of them. I expect to be in Aberdeen some time next week and will see you then.

"2 checks enclosed. Yours truly, J. M. Clapp."

Counsel attempt to cast some doubt upon this letter, but we think it is clearly established that the letter was written as claimed, and was transmitted with the funds used to

complete the purchase. It is also clearly established that the appellants refused absolutely to loan the money upon the property, or to take a second mortgage as security. These facts, together with the further fact that the deed and bond for a deed were executed in conformity to the directions contained in the above letter, and the fact that the appellants assumed the first mortgage in their deed, and afterwards paid \$1,000 thereon, and executed a new note and mortgage for the balance, leave no room to doubt that the transaction was in fact such as the appellants claimed.

These undisputed facts cannot be overthrown by mere general statements that the transaction was a loan of money, or that the property was taken as security. The property was, in one sense, a security. The appellants had no interest therein except to transfer it to the respondent, upon the return of the money advanced by them, with interest, within the time provided in the bond for a deed, provided the terms of the bond were complied with. Nevertheless, these instruments were executed in their present form deliberately and intentionally. They constituted the only form of security that the appellants would take or consider, and to place any other construction upon them is to do violence to the intention of the parties, and set aside their contract, making a new one in lieu thereof. The respondent had an option on certain property, which was about to expire. The appellants refused to make a loan on the property, or to take a mortgage as security, but agreed to advance the money to take up the option, take title to the property in their own name, and to convey it to the respondent upon the terms and conditions set forth in the bond for a deed. These facts are clearly established by the testimony, and bring this case within the decisions of this court in *Dignan v. Moore*, 8 Wash.

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312, 36 Pac. 146; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; and *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61.

In *Dignan v. Moore*, *supra*, the court says:

"If we should sustain the contention of the appellants, under the facts disclosed by this record, it would be in effect to hold that two persons standing upon an equal basis are incompetent to make a contract by which one of them shall sell to the other real estate, and make a deed thereto which shall be absolute as between the parties, and at the same time agree that the grantor in said deed shall have the right to repurchase the property sold. We are not prepared so to restrict the power of competent persons to control their property and contract in regard thereto."

In *Swarm v. Boggs*, *supra*, the court says:

"When the instrument is construed in connection with the circumstances surrounding its execution, as shown by the agreed statement of facts, it appears beyond question that the parties did not intend such instrument as a mortgage, but, on the contrary, intended that thereby the absolute title should pass from the grantors to the grantee, with the right in the grantors to repurchase in accordance with the conditions stated in the instrument. And since the rule under which a deed was held to be a mortgage was originated, that the real intent of the parties should be given force, the language of the instrument should not be nullified unless it is shown that it did not correctly interpret the intention of the parties."

The appellants further contend that there was no obligation on the part of the respondent to repay the money, and that hence there could be no mortgage. It is not claimed that such obligation was imposed otherwise than by the bond for a deed. This bond was not signed by the respondent, and the question of his liability to pay the purchase price by reason of the bond alone is a very serious one, which we do not deem it necessary to decide in this case, as we hold the transaction cannot be construed to be a mortgage, independently of the question whether there

was a subsisting obligation to pay the purchase price, at the time of the execution of the deed and the bond for a deed.

Some question is raised as to the time of the tender, the sufficiency of the tender, and the form of the judgment; but, in the view we have taken of the case, these questions become immaterial. The case was tried below, and in this court, on the mortgage theory, and inasmuch as the judgment cannot be sustained on that ground, it cannot be sustained at all. The rights of the respondent, if any, exist under the bond for a deed, and are fixed by that instrument, and not by the law of mortgages. The case was not prosecuted or defended in the court below with a view of determining the rights of the respondent under his bond for a deed, and, under the testimony in the case, this court is unable to pass upon that question, or render a final judgment herein. We think, however, that any rights the respondent may have under his contract of purchase should be determined in this action, without the necessity or expense of another action.

The judgment of the court below is therefore reversed, and the cause remanded for further proceedings, not inconsistent with this opinion. The parties will be permitted to amend their pleadings, if they so desire, and the court will thereupon determine the rights of the respondent under his bond for a deed, if any, and will take further testimony for that purpose.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

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Citations of Counsel.

[No. 5170. Decided March 4, 1905.]

DELTA COUNTY BANK, *Appellant*, v. ANNA F.McGRANAHAN *et al.*, *Respondents*.¹

DURESS—BILLS AND NOTES—HUSBAND AND WIFE—NOTE OF WIFE TO AVOID CRIMINAL PROSECUTION OF HUSBAND. Duress is a valid defense to a promissory note which was made by a married woman in payment of her husband's debts to avoid a threatened criminal prosecution against her husband.

BANKRUPTCY—JUDGMENTS—DISCHARGE—DEBTS NOT SCHEDULED—ACTUAL NOTICE OF CREDITOR. A discharge in bankruptcy is a good defense to an action upon promissory notes, although the notes were not scheduled in the list of obligations, where the creditor had actual notice of the proceedings in time to have presented its claim, and failed to do so.

SAME—COLLATERAL ATTACK—MONEY MISAPPROPRIATED. The order of discharge in bankruptcy is conclusive on collateral attack as to all provable debts not specially excepted, including notes given for money misappropriated while acting in a fiduciary capacity.

Appeal from a judgment of the superior court for Kit-titas county, Rudkin, J., entered November 12, 1903, upon findings in favor of the defendants, after a trial before a court without a jury, dismissing on the merits an action upon promissory notes. Affirmed.

Eugene E. Wager, for appellant. The separate debt of the husband is a sufficient consideration for the wife's execution of the notes. 1 Daniel, *Negotiable Inst.*, § 185; *Popple v. Day*, 123 Mass. 520. A note executed under duress must be disaffirmed within a reasonable time. 10 Am. & Eng. Ency. Law, p. 337; *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967; *Davis v. Fox*, 59 Mo. 125; *Gregor v. Hyde*, 62 Fed. 107. Duress alone does not entitle a party to relief unless the contract is essentially unjust.

¹Reported in 79 Pac. 796.

Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. 202; *White v. Heylman*, 34 Pa. St. 142; *Crawford v. Cato*, 22 Ga. 594; *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997; *Scholey v. Mumford*, 60 N. Y. 498; 4 Am. & Eng. Ency. Law (2d ed.), p. 343. Threats of criminal prosecution do not constitute duress. *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Youngs v. Simm*, 41 Ill. App. 28; *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Phillips v. Henry*, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. 706. A discharge in bankruptcy does not release from obligations for money misappropriated while acting in a fiduciary capacity. *Warren v. Robinson*, 21 Utah 429, 61 Pac. 28, 75 Am. St. 734; 5 Cyc. p. 4. Nor from provable debts not scheduled. See Bankruptcy Act (1898), Ch. 3, 17a; *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2, 6 Am. Bank. Rep. 430.

Hovey & Hale, for respondents.

FULLERTON, J.—In this action the appellant sought to recover from the respondents the sum of \$1,417, alleged to be due upon two promissory notes, executed by the respondents to the appellant at Delta, Colorado, on January 4, 1898. To the complaint, which was in the usual form, the respondents answered, averring that the notes were executed without consideration, and that the respondent Anna F. McGranahan had signed the same under duress; such duress consisting of threats to institute a criminal prosecution against her husband, made by the officers of the appellant, if certain property owned by her was not delivered to the appellant, and the notes in suit executed. The respondent T. H. McGranahan defended on the ground that he had been discharged in bankruptcy, from all debts and claims which are made provable by the bankruptcy act of the United States, and that the debts represented by the notes in the suit were such provable debts. Issue was taken

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on the answers, and a trial had before the court without a jury, resulting in a judgment for the respondents.

That Mrs. McGranahan executed the notes in suit, and turned over to the appellant certain of her individual property, in payment of her husband's debts to avoid a criminal prosecution against her husband, is testified to, not only by herself and husband, but by the officers of the appellant also. The officers say that Mr. McGranahan, as president of the appellant bank, loaned himself large sums of money, which he was unable to repay; that the creditors of the bank believed the property claimed by Mrs. McGranahan was procured by some of this money so borrowed, and they insisted that the property be turned over to the bank, else McGranahan be prosecuted for having violated the criminal statutes of Colorado; that they communicated this fact to the respondents, and that the property was turned over accordingly; the notes being given in lieu of a mortgage the respondents had placed on the property. This, we think, taken with the testimony of the respondents, justifies the finding of duress made by the trial court, and warrants the judgment relieving Mrs. McGranahan from liability on the notes. *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803.

It is contended that the discharge in bankruptcy did not release T. H. McGranahan from the obligation of these notes, because, it is claimed, the notes were not scheduled in his list of obligations filed in the bankruptcy proceedings, and because the notes were given for money misappropriated by him while acting in a fiduciary capacity. We think, however, that neither of these objections are well taken. The bankruptcy act does not except, from the order of discharge, all claims not duly scheduled; it excepts such unscheduled claims only where the creditor has no notice or actual knowledge of the bankruptcy proceed-

ings. As the appellant was listed as a creditor of the bankrupt and due notice of the bankruptcy proceedings was sent it in time for it to present all of its claims, it had notice and actual knowledge of the proceedings, and the rule contended for is not applicable.

The second objection is one that might have been urged in the bankruptcy proceedings to prevent an order of discharge against this particular debt, but it cannot be urged to except from the operation of the order claims that were plainly included within it. In other words, the order of the bankruptcy court discharging a bankrupt from his provable debts is conclusive, on collateral attack, as to all provable debts of the bankrupt not specially excepted.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5275. Decided March 4, 1905.]

CHARLES H. DIXON, *a Minor*, by M. G. Royal, his Guardian *ad Litem*, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.¹

RAILROADS — BRAKEMEN — AUTHORITY — WANTON EJECTION OF TRESPASSER. A brakeman on a freight train acts within the scope of his authority in ejecting trespassers from the cars, and the company is liable for injuries resulting from the wanton and wilful act of the brakeman in so doing in an improper manner while the train is in motion, without evidence showing the brakeman's authority.

SAME—EVIDENCE—RES GESTAE. Where a trespasser, a boy, was wrongfully ejected from a train while in motion, his arm being crushed under the wheels, his statement, upon being discovered five minutes thereafter, in great pain and crying, that the brakeman kicked him off the train, is admissible as part of the *res gestae*.

¹Reported in 79 Pac. 943.

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SAME—HEARSAY EVIDENCE. In such a case the statement of a stranger who witnessed the accident, made to the witness, is not admissible as part of the *res gestae*, being hearsay.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 29, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in being ejected from a moving train. Affirmed.

B. S. Grosscup and *A. G. Avery*, for appellant.

Troy & Falknor, for respondent.

DUNBAR, J.—This action was brought in behalf of one Dixon, to recover damages for the alleged wanton and wilful act of a brakeman in kicking him from a moving train, resulting in injuries necessitating the amputation of his arm. Dixon was a boy about eighteen years old, and was beating his way on a freight train from Portland to Tacoma, riding on the bumpers six or seven cars back from the engine. The train reached Centralia about two o'clock in the morning of July 3, 1903, stopped a few minutes, and then pulled out. After going two or three hundred yards from the depot, a brakeman came over the cars, and asked Dixon if he had any money, and, being told that he had none, swore at him and told him to get off. He answered that the train was going too fast, and he could not get off, and the brakeman said, "Now, you son of a b——, get off," and thereupon stepped on his fingers (Dixon was holding on the car ladder), and kicked him loose, kicking him on the head and shoulders several times. By reason of such treatment, he was forced to let go of his hold on the ladder, and fell down on the track, the wheels of the car running over his arm, and mangling it so that amputation was necessary. This was the testimony of Dixon, which was denied by the train men, but was a question that was

submitted to the discretion of the jury, and may be considered a fact established in the case. Upon trial, the jury brought in a verdict for plaintiff in the sum of \$1,999.

It is assigned that the court erred, (1) in denying defendant's motion for nonsuit, made at the close of the testimony; (2) in denying defendant's motion for a new trial made upon the ground, among others, that the evidence was insufficient to justify the verdict, and that the verdict was against the law; (3) in allowing the witness Scheelke and the witness Reisinger to testify, over the objection of defendant, to statements made by plaintiff after the accident, to the effect that "that son of a b—— of a brakeman kicked him off the train;" and (4) in refusing to allow the witness Shields to testify to statements made to him by a stranger, at the time and place of the accident, as to the manner in which it occurred.

The question involved in the first and second assignments, which are argued together in appellant's brief, raises the question of the responsibility of a railroad company for the wanton and wilful act of a brakeman, resulting in injury to a trespasser, in the absence of evidence showing that the brakeman's act was within the scope of his employment. It is earnestly contended by the respondent, with some degree of reason, that this question cannot be raised in this court by the appellant, it not having been raised in the lower court. With the view we take of the merits of the case, it is not necessary, in the respondent's interest, to discuss this question, and we mention it only to prevent the claim which might be made in some future case that, under the doctrine of this case, the court had retreated from the position, which it has uniformly taken, that a case must be tried in this court upon the same theory on which it was tried below; but, inasmuch as the merits involve an important question, which is sure to rise at some

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future time, we have concluded to enter upon a discussion thereof.

Of course, there is no question but that there is a sharp distinction drawn by the authorities between passengers and trespassers on a railroad car, but the distinction is as to the duty owing by the company, and not as to tortious acts committed on either passenger or trespasser. A high degree of care on the part of the company is exacted by the law, to insure the safety of the passenger who has, for a mutual consideration, placed himself in the care and under the charge of the company. To this degree of care, the trespasser is, of course, not entitled, for he has no contractual relation with the company, and cannot therefore plead, as can a passenger, that there is an implied provision in the contract that the company has employed suitable servants to run its trains. Standing as a naked trespasser, the company is not bound to consider his interests in the selection of its servants, or in the performance of its business in any way.

But, notwithstanding this distinction, the law, out of regard for common humanity, will not permit a master to allow his servant to unnecessarily abuse or imperil the life or limb even of a trespasser, and, if the company, through its servants, wilfully injure him, it will be liable, even though he may have been guilty of contributory negligence. It is well settled, generally, that a railroad company is responsible in damages to a trespasser for torts committed upon him by a servant who, in the commission of the tort, is acting in the line of his employment, and within the scope of his authority—not within the scope of his authority as applied to the commission of the tort, for no authority for such commission could be conferred, but within the scope of his authority to rightfully do the particular thing which he did do in a wrongful manner. And, while the master

will not be held liable for the wilful act of the servant not done to further or protect the master's interest, or with a view to the master's service, if the servant is authorized to perform the duty, but in the performance of that duty acts wilfully or negligently to the detriment of another, the master will be held liable. So that the pertinent question in this case is, was the brakeman acting within the actual or implied scope of his employment, when he committed the act complained of?

Upon this question there is a great conflict of authority, many courts, as asserted by the appellant, holding that it is not within the implied authority of a brakeman to expel trespassers from the company's trains, but that their business, as their name implies, is to attend to the brakes on the cars. Many of the authorities cited by appellant, while discussing incidentally the question involved here, are based upon other principles, and are not of value in determining this question; and others, notably the text books, simply undertake to give an expression to the general current of authority. Thus, the appellant's citation from Patterson on Railway Accident Law, that the general rule is that, in order to render the railroad liable for the act of the servant, it must also be shown that the particular act which caused the injury was within the scope of the servant's employment, is of little value, for the question here is whether the act committed was within the scope of the servant's employment impliedly. It will not be contended anywhere that the railroad would be liable, if the servant was acting entirely without the actual or implied scope of authority, and upon an independent proposition not connected with the master's business. The same author, however, on page 109, after discussing this proposition and citing some cases holding in favor of appellant's contention, says:

"The doctrine of most of the cases, however, is that

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wherever a railway servant is put in charge of any property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine-driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is, therefore, for that purpose vested with an implied authority to remove trespassers therefrom; and if he makes a mistake, either by removing a person who is rightfully therein or thereon, or by using unnecessary violence in the removal of a trespasser, the railway must be held liable for all such injuries as result, in the one case from the removal, and in the other case from the unnecessary violence with which that removal is effected."

It is further said, on page 110:

"The doctrine of the last mentioned class of cases seems to be sound, for, if the person who does the wrongful act be, in fact, a servant of the railway, and if the act be done in furtherance of the general purposes of the railway, and not to accomplish an independent personal purpose on the part of the servant, the railway ought to be held liable therefor, on the ground of an implied delegation to the servant of authority for the performance of the particular act, . . ."

There are, however, many cases cited by the appellant which hold directly that a brakeman is not within the actual or implied scope of his authority or employment when ejecting a trespasser from a train. The most pointed and strongest case on this question, among others, is *Farber v. Missouri Pac. R. Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, where it was held that it cannot be assumed, in the absence of proof, that a brakeman on a freight train was authorized to remove a trespasser. And, also, *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299, 9 S. W. 905; *Gala-viz v. International etc. R. Co.*, 15 Tex. Civ. App. 61, 38 S. W. 234; *Texas & Pac. R. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79; *Texas & Pac. R. Co. v. Moody*,

(Tex. Civ. App.) 23 S. W. 41; *Illinois Cent. R. Co. v. Latham*, 72 Miss. 32, 16 South. 757; *Marion v. Chicago etc. R. Co.*, 64 Iowa 568, 21 N. W. 86; *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418. There are other cases holding substantially to the same doctrine, but those above mentioned are exactly in point, being brakeman cases; and the doctrine of those cases is, that it is well established, as a matter of rule and of common observation, that the conductor is in control of the cars, and that it is his duty to see that the cars are protected from trespassers; that it is the brakeman's duty to exercise this control only when he is authorized by the conductor to do so; and that, in the absence of proof of such authorization, he will not be regarded as acting within the scope of his authority.

There is, however, another line of authorities, most of which are of a more recent date, holding that it is a matter of common knowledge and observation, of which courts will take judicial notice, that it is the duty of a brakeman to exercise supervisory control over the cars, a control which includes within its limits the right to protect the cars by ejecting trespassers therefrom; and we are inclined to yield our allegiance to this doctrine. It must be evident to every one who travels on railroad trains that, while it may be true, theoretically, that the conductor is in charge of the cars, his special duties are more of a business character; that he looks out for the business of such train—if a passenger train, for the collection of fares and the proper exercise of the duties of the company towards passengers; if of a freight train, for the proper handling and transmission of freight, and for the direction of the movements of the train in a general way.

The business of a brakeman, while it may have originally been restricted to the operation of brakes, has grown into a supervision, to a certain extent, of the cars. He

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meets you upon the platform, when you start to enter a car, and will not permit you to enter until he individually sees to it that passengers who desire to alight from the cars have alighted, thereby preventing the confusion and jostle incident to the unrestricted egress and ingress of the passengers; and, if a passenger were to insist upon disobeying his orders in this respect, and the brakeman assaulted him sufficiently to protect the interest of the company in carrying out his orders, we have no doubt that he could successfully plead the exercise of his duties in defense of the assault, in any court in the Union. He is found looking after the doors of the cars, to see that they are open at the proper time and closed at the proper time, and the ventilation of the cars. He will be seen in the performance of his duties on the top of the cars, where this brakeman was, and it is a fact notorious that he is exercising supervisory powers over the cars. It may be that these powers have increased with the changing conditions incident to railroad-ing, and that the observation of this increase in his powers is the cause of the change in judicial decision on this question; for it is noticeable that most of the cases holding to the theory that the brakeman is not acting within the scope of his authority or employment, when ejecting a trespasser from the train, were decided many years ago, while the great majority of the cases holding to the other doctrine are of modern announcement. While this authority, of which we have been speaking, may not be strictly conferred upon the brakeman by the terms of the employment contract, we think that it must be a matter of common observation that such authority is an inference from the nature of the business, and its actual daily exercise.

In addition to this, the rule for which the respondent contends places the burden of proof where it justly belongs, viz., upon the railroad company, which has the knowledge

of its contractual relations with its servants, and can show lack of actual or implied authority, or usage or custom, which would raise the presumption of implied authority, if such authority or custom does not exist in the management of its business; while the party who is injured has not the benefit of this knowledge, and can only judge of who is in authority on a railroad train by appearances. Railroad employees as a rule are dressed in certain garbs that distinguish them as railroad men, and when a demand is made upon a passenger, or even upon a trespasser, by one of these men so distinguished, the presumption is that he speaks with authority, and the other party has no way of determining that he does not, except at his peril. It would be an impracticable thing to ask of a person, when a demand is made upon him by a brakeman, in regard to something which was connected with the business of the operation of the train, that he should go the length of a train to find a conductor to ask him if the employee with whom he was in controversy had authority to make the demands which he was making. So that no injustice can be done the railroad company in holding, as many of the cases do hold, that, in case of a brakeman ejecting passengers, whether trespassers or otherwise, the burden is upon the railroad company to show lack of actual or implied authority. Sustaining this view of the law, the respondent cites many authorities, among which is Baldwin's American Railroad Law, p. 254, where the rule, under the title "Brakemen," is thus tersely stated:

"It is prima facie within the implied authority of a brakeman, whether on a passenger or a freight train, to put off any person who is found upon it without right; and if he does this at an improper place or in an improper manner, whereby such person is unnecessarily injured, the company is liable, even if the act were wanton and reck-

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less, provided it were not done to accomplish an independent, malicious purpose of his own."

This is a new work, issued in 1904. In *Smith v. Louisville etc. R. Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72, it was held that a brakeman on a railroad train, as well as the conductor, is conclusively presumed to have authority to eject trespassers or intruders, and if he uses unnecessary violence in doing so, the company is responsible for the injury resulting. And in that case it is said:

"The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience."

In *Hoffman v. New York Cent. etc. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, it is held that the conductor of, or a brakeman upon, a railroad passenger train has authority to remove, in a lawful manner, a trespasser upon the platform of a car, whether the authority is conferred by the rules of the company or not; it is implied and is incident to his position. It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable. *Kansas City etc. R. Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596.

In *Lang v. New York etc. R. Co.*, 51 Hun 603, 4 N. Y. Supp. 565, a case where a boy without authority got upon a train, and the brakeman told him to get off, the boy refused to do so, and the brakeman threw a lump of coal on the top of the car which struck the boy on the head, whereupon he fell from the car under the wheels and lost his foot, it was held that the brakeman was engaged in the master's business and acting within the general scope of

the authority conferred upon him. In the opinion it is said:

"It is not necessary to show specific order to brakemen, by the master, to drive off boys who were 'stealing a ride.' The brakeman was engaged in the master's business, and acting within the general scope of the authority, . . . The brakeman was apparently engaged for the defendant, and clearly was not pursuing his own purpose, . . ."

"It is within the scope of the implied authority of a brakeman in charge of a freight train to eject trespassers therefrom." *O'Banion v. Missouri Pac. R. Co.*, 65 Kan. 352, 69 Pac. 353.

In *McKeon v. New York etc. R. Co.*, 183 Mass. 271, 67 N. E. 329, 97 Am. St. 437, a case decided November 18, 1902, it was held that a railroad company is liable to a boy who, when stealing a ride on the front platform of the baggage car of a passenger train, is recklessly pushed from the car by a brakeman of the company, while the train is in motion, and is injured by falling under it; that it is within the scope of the authority of a brakeman on a passenger train to remove, in a lawful manner, from the platform of a baggage car, one who is riding there for the purpose of evading his fare. In the course of the opinion, it is said:

"A conductor has implied authority by virtue of his employment to eject a trespasser from the train under his control [citing *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200, and cases cited]. An engineer would probably have like authority to eject a trespasser from his engine. A brakeman has less authority than either. His duties primarily relate, as his name implies, to the management of the brakes. But common observation shows that on passenger trains they embrace much more, and that so far as the management of the brakes on such trains is concerned, their duties have been largely superseded by the appliances in use. On passenger trains

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brakemen are required to look after the safety and comfort of the passengers, to protect the property of the company, and to see that fares are not evaded. The rules of the defendant company as well as common observation show this. And while the brakeman in question was not in any just sense a conductor or even a sub-conductor, we think that the jury were warranted in finding as they must have found under the instructions of the judge that it was within the scope of his authority to remove the plaintiff in a lawful manner from the platform if he was there for the purpose of evading his fare."

In *Hill v. Baltimore etc. R. Co.*, 78 N. Y. Supp. 134, decided October 10, 1902, it was held that, where a brakeman on a railroad train, in order to eject one stealing a ride, uses an unreasonable method, calculated to increase the trespasser's danger, and such action is the proximate cause of an injury, the railroad is liable. To the same effect are *Chesapeake etc. R. Co. v. Anderson*, 9 Am. & Eng. Railroad Cases (N. S.) 136; *Johnson v. Chicago etc. R. Co.*, 116 Iowa 639, 88 N. W. 811; *Bjornquist v. Boston etc. R. Co.* (Mass.), 70 N. E. 53; *Johnson v. Chicago etc. R. Co.*, 123 Iowa 224, 98 N. W. 642, a case decided February 20, 1904, and many other cases too numerous to mention.

The testimony complained of in assignment No. 3, viz., that of the witness Scheelke and the witness Reisinger, to statements made by the plaintiff after the accident, to the effect that the brakeman kicked him off the train, we think was plainly admissible under the doctrine of *res gestae*; that it was a spontaneous, impulsive statement of fact, while the boy was suffering intense and excruciating pain, and under the excitement of the accident, when the natural prompting would be to speak the truth. The testimony was to the effect that they heard somebody crying for help; that they ran down and found Dixon alone, holding his

arm and crying; that it was between five and ten minutes after the accident occurred, and that, when asked what had happened, the answer above stated was given. This we think was sustained under the rule announced by this court in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111, and *Lambert v. LaConner etc. Trans. Co.*, 30 Wash. 346, 70 Pac. 960.

It is also urged by the appellant that, if the court was warranted in admitting, as a part of the *res gestae*, the testimony of these two witnesses, it committed error in refusing to allow the witness Shields to testify to statements made to him by a stranger, at the time and place of the accident, as to the manner in which it occurred. But we think the court did not abuse its discretion in this respect. There is no showing that the stranger, who was not able to be found at the trial, was in any way connected with the accident, or prompted by any circumstances to speak the truth in regard to it, and, under the circumstances, it seems to us that it would simply be the admission of hearsay testimony.

There being no error discoverable in the record, the judgment is affirmed.

MOUNT, C. J., HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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Statement of Case.

[No. 4422. Decided March 4, 1905.]

FABIAN S. POTVIN, *Appellant*, v. DENNY HOTEL COMPANY
et al., *Respondents*.¹

ESTOPPEL—MECHANICS' LIENS—MATERIAL INTENDED TO BE USED CONSIDERED PART OF REALTY—CONTRACTOR BOUND BY PREVIOUS LITIGATION. The plaintiff, a contractor, is estopped from claiming that finishing material intended to be used in the construction of, and actually stored in an unfinished hotel building, is not part of the realty, where it appears that he purchased the material to be used in the construction of the hotel and brought an action to foreclose a mechanics' lien on the building and material, and recovered a judgment for the amount due him, which was declared a lien on the real estate, and the real estate was sold thereunder; and where he had in another suit enjoined the levy of execution upon the material, on the ground that the material was in good faith intended to be used in the building; and where in other litigation to which he was a party it was found that appellant's lien was subordinate to a mortgage lien upon the real estate; and where the material was afterwards actually used in the construction of the building, after being sold on execution issued upon a judgment recovered against him for the purchase price thereof; since it appeared that the court treated the material as part of the real estate in adjusting the rights of the parties, and the title thereto passed by the plaintiff's execution sale of the real estate.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 15, 1902, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to set aside a conveyance as fraudulent as to creditors. Affirmed.

Charles E. Patterson and *James J. Easley*, for appellant.

E. F. Blaine and *Lee DeVries*, for respondents.

¹Reported in 79 Pac. 940.

Root, J.—This case was once before appealed to this court, and the opinion handed down therein may be found in 26 Wash. 309, 66 Pac. 376. Reference is now made to that opinion for a more complete statement of the facts involved. At that time the trial court, having sustained a demurrer to appellant's complaint, and he having elected not to amend, and a judgment of dismissal having been rendered, an appeal was taken from said judgment. Appellant's action is based upon a partially unsatisfied judgment, obtained in foreclosing a contractor's lien against the Denny Hotel Company and its former property, the Denny Hotel.

In his complaint appellant prayed that the conveyance of certain real and personal property (finishing material), from the Denny Hotel Company to A. A. Denny, be adjudged fraudulent, as having been made for the purpose of hindering, delaying, and preventing the collection of claims due appellant, and other creditors, from the hotel company; and that said A. A. Denny be required to pay into court, for the use and benefit of plaintiff and other creditors, the difference between the value of said real estate and the amount bid therefor, to wit, \$82,670; and that he also be required to pay into court, for the use of plaintiff, the value of said personal property, to wit, \$25,000. In the decision of this court, when the case was here before (26 Wash.), the appellant was held not entitled to have the conveyance of the real estate decreed fraudulent, or to recover anything on account thereof; but it was held that, in so far as the personal property was concerned, the complaint stated a cause of action. Among other things, the court said:

"If, as alleged, appellant has a lien upon it prior in time to the transfer, he has a right to have the lien foreclosed, and the property sold in satisfaction thereof. . . .

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If the transfer was made, as averred in the complaint, without consideration, it is voidable at the suit of a creditor, for an insolvent corporation has no right to give away its property to the prejudice of its creditors."

The case being remanded to the superior court, an answer was interposed by respondents, wherein they denied appellant's possession and right of lien, and all the allegations of fraud; and set up that, in another proceeding, wherein appellant was one of the plaintiffs, certain other creditors of the Denny Hotel Company had been restrained from selling said finishing material, by execution on judgments against said hotel company, upon the ground that the said material was to be used in good faith for the completion of said building, and was subject to the lien of said appellant. It was alleged that appellant had sought the confirmation of the sale of the real estate, when purchased as aforesaid by A. A. Denny, and had received a portion of the proceeds. And it was alleged that said appellant was estopped from maintaining that said material was not subject to the lien, which he established against the property, and from asserting that the execution sale did not convey both real estate and building material

At the conclusion of the trial, the court decided in favor of respondents—finding that the building of the hotel was abandoned on account of financial embarrassment; that the hotel corporation had quit and abandoned the business for which it was incorporated; that the real estate, including said hotel building, at the time of the sheriff's sale, was worth \$100,000; that A. A. Denny was president of, and a stockholder in, said hotel company; that appellant, as contractor, had obtained a judgment of \$186,386.78, with interest from the 6th of March, 1896, and that the amount so found due was declared a valid lien upon the real estate; that, when the construction work

ceased, there was in the building a large amount of lumber, mill work, etc., which had been principally furnished by Huttig Brothers Manufacturing Company; that the hotel company was indebted in an amount exceeding \$400,000, and was hopelessly insolvent; that, prior to the commencement of the action, an *alias* execution on appellant's judgment was issued, and returned wholly unsatisfied and *nulla bona*; that appellant had caused the hotel company's real estate to be sold on special execution, A. A. Denny being the purchaser, for the benefit of himself and two other creditors of the hotel company; that A. A. Denny was a creditor of the hotel company in a sum exceeding \$20,000; that said Denny and Dexter Horton & Co. had, for value, become the owners of the judgment of one Wickershaw, theretofore obtained against said hotel company; that said hotel company had deeded its property to A. A. Denny, to satisfy his claims against it; that appellant received \$1,000 from the proceeds of the sale of the real estate, and never objected to the confirmation of the sale of said property; that, after the execution sale of said hotel real estate, Huttig Brothers Manufacturing Company, upon execution on the judgment held against appellant for the purchase price of the lumber, furnishings, etc., hereinbefore mentioned, sold the same, bidding it in and, with Denny and Dexter Horton & Co., using it in the completion of the hotel building.

The court made conclusions substantially as follows: That the execution sale of the real estate was valid and binding upon the appellant, and that no redemption had ever been made; that the execution sale upon the judgment of Huttig Brothers Manufacturing Company, of the lumber and loose material about the building, was valid, and transferred the property therein to said company; that

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the plaintiff was not entitled to recover against the respondents, or any of them. Judgment and decree of dismissal was made and entered upon said findings and conclusions. From said judgment and decree, this appeal is taken.

Exceptions were taken to part of the findings, and to all of the conclusions. There is but little controversy over the facts. The findings of the trial court, we think, are fairly sustained. Appellant contends that the sale of the real estate did not transfer or affect the lumber, mill work, and furnishings unused in and about the hotel building; that he, at said time, had possession of said material, and that it was personal property; that said material was subsequently taken wrongfully by said A. A. Denny, and, by him and associates, used in the completion of said hotel building. He claims that the sale of the lumber, mill work, etc., by Huttig Brothers Manufacturing Company, was not pleaded so as to be available as a defense. He also contends that, if said defense were justifiable under the answers, it is nevertheless insufficient, for the reason that the judgment was obtained April 11, 1892, and the sale did not occur until April 9, 1898, or more than five years after its rendition, and at a time when it was dormant and incapable of supporting an execution. He also claims that, at the time of this sale, the title to this said lumber, mill work, etc., was not in him, but that it was in the Denny Hotel Company; and that, consequently, no title passed to Huttig Brothers Manufacturing Company by reason of said sale. At said sale the material brought only \$1,699.25. Appellant claims that it was worth \$25,000. He maintains that the execution sale of the real estate, upon the judgment held by himself against the Denny Hotel Company, did not convey the lumber, mill work, etc.,

for the reason that said material was not a part of the building at that time, and did not constitute a portion of the real estate.

It appears from the record that, in the action brought by appellant, Dexter Horton & Co., and Huttig Brothers, against Wickersham, *et al.*, appellant alleged in his complaint that he had purchased said lumber, etc., to be used in the construction of said hotel building, and was at that time prosecuting an action to enforce a lien upon said building, and upon said lumber, etc. The action that he was so prosecuting was the one wherein he subsequently recovered a judgment of over \$186,000, and had it decreed a lien against the real estate. It would thus appear that appellant treated this lumber, etc., as a part of the real estate, and as subject to the lien for the amount due him as contractor and material man. It appears that the said material was, as a matter of fact, subsequently used in the construction of the building as originally intended. The case of *Potvin et al., v. Wickersham et al.*, came to this court, and the opinion is found in 15 Wash. p. 646, 47 Pac. 25. This court sustained the lower court in enjoining Wickersham *et al.* from levying upon this material, by virtue of a judgment held against the Denny Hotel Company; and held that the lower court was "warranted in finding that the materials were in good faith intended to be applied to the completion of the building." In the same case the court said: "It appears that the materials in question had been gotten out especially for the building, and were of little value except for the purposes for which they were designed." This is clearly apparent now; and, if it be conceded that said material cost \$25,000, yet it could not be expected that it would bring more than a small fraction of its cost, when subjected to forced sale.

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In fact it could scarcely be expected that a substantial bid for such property would be made by any one not interested in the hotel building.

Twelve years ago there came before this court several cases (consolidated) wherein questions of priorities of liens upon this same hotel property were involved. See, *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073. At that time, in the case of *Huttig Bros. Mfg. Company v. Potvin and the Denny Hotel Company*, it was held that said Huttig Bros. Mfg. Company was entitled to a lien upon the loose finishing material on the premises, even though the same had not been built into the building. In the same opinion it was held that this lien was subordinate, however, to the lien of a mortgage held by the Cornell University upon the *lands* upon which said hotel was erected. This would seem to indicate that the court regarded this loose finishing material as a part of the realty, and treated it as such in adjusting the rights of appellant and others concerned in this hotel property matter. Otherwise, the *real estate* mortgage of the university could not have been a prior lien, or a lien at all, upon this material. From the proceedings had in all of these cases, and in the light of the admitted facts, it would seem that appellant treated this lumber, etc., as a portion of the realty, and as impressed with the lien of his judgment. To allow him to urge that this material was personal property, and not affected by the execution made upon his judgment, would, we think, be to permit him to prevail upon a theory inconsistent with that which he acted upon in these other cases, and in the transactions connected therewith. Moreover, the sale made by Denny Hotel Company to A. A. Denny, Dexter Horton & Co., and Huttig Bros. Mfg. Co., of this lumber, was not shown to have been without consideration;

but it appears that these persons were creditors of said hotel company, in large amounts, A. A. Denny alone in a sum exceeding \$20,000.

Respondents claim legal title to this personal property by reason of one or more of the following named transactions: First, the execution sale of the realty upon appellant's judgment; second, the bill of sale from the hotel company; third, the execution sale of the material upon the judgment of Huttig Bros. Mfg. Co. against appellant. To defeat their claims it is incumbent upon appellant to show the invalidity or insufficiency of each and all of these transactions to effect a legal and rightful transfer of the title of said property. We are constrained to hold that he has not made a sufficient showing to accomplish this result. Without passing upon the sale made by Huttig Bros. Mfg. Co., we think that the execution sale of the realty upon appellant's judgment conveyed this finishing material; and, even, if this were not so, we are unable to find a substantial basis for challenging the sufficiency and legality of the bill of sale of this material by the hotel company to A. A. Denny.

The judgment of the lower court is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, RUDKIN, and CROW, JJ., concur.

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Statement of Case.

[No. 5462. Decided March 4, 1905.]

SAM HENNE, *Respondent*, v. J. T. STEEB SHIPPING
COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—DUTY TO FURNISH SAFE APPLIANCES—PLEADING—COMPLAINT—SUFFICIENCY. A complaint in an action for personal injuries sustained by a stevedore in defendant's employ, through the breaking of a rope sling, is not insufficient in containing the erroneous statement that it was the defendant's duty to furnish the very best and safest sling available, when a breach of duty in using an unsafe and rotten rope is otherwise sufficiently alleged.

SAME—UNSAFE ROPE SLING—PLEADING AND PROOF—EVIDENCE—ASSUMPTION OF RISKS. In an action by an experienced stevedore against his employer for personal injuries sustained through the breaking of a rope sling, alleged to have become rotten and unsafe, it is not admissible to show that rope slings are not in general use and that chain or wire slings are safer; since (1) the use of a rotten rope sling is the only negligence alleged, and (2) the damages incident to the use of a sufficient rope sling were assumed by the plaintiff.

SAME—EVIDENCE—INSTRUCTIONS—CURING ERROR. Error in the admission of such evidence is not cured by an instruction to the effect that the defendant owed the duty to use care in the selection of the rope in question, since the jury could assume from the charge and the evidence that any rope sling was insufficient.

SAME—PLEADING AND PROOF—INSUFFICIENT ROPE SLING—PROOF OF OVERLOADING. In an action for personal injuries sustained through the breaking of a rotten rope sling, evidence of the overloading of the sling is admissible to show negligence in the use of the sling, although overloading is not alleged as a distinct ground of negligence.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 16, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a stevedore for personal injuries sustained through the breaking of a rope sling. Reversed.

¹Reported in 79 Pac. 938.

James M. Ashton and W. H. Hayden, for appellant.

W. H. Harris, for respondent.

RUDKIN, J.—This is an action to recover damages for personal injuries. On the 2d day of October, 1903, the defendant corporation was engaged in loading a cargo of lumber in the hold of the U. S. steamship "Dix," at the wharves in the city of Tacoma. The plaintiff was in the employ of the defendant corporation, and was engaged in stowing the lumber in the hold of the vessel. The lumber was transferred from scows to the steamship in a rope sling, by means of steam winches on the steamship, and thence lowered through the hatchway into the hold. On the date above mentioned, this rope sling broke, and the lumber contained in the sling fell through the hatchway, and struck the plaintiff, thereby causing the injury complained of.

The complaint alleged, that it was the duty of the defendant corporation to use the best, safest, and strongest slings available, or that could be procured, for the purpose of loading the lumber into the steamship; and alleged negligence in the fulfillment of that duty, as follows:

"The defendant, through the carelessness and gross negligent acts of its said servants and employees on the main deck of said vessel, who were working under the direction of its duly authorized foreman, used a rope sling which had been lying in a locker of said steamer for a long while, and had become rotten and unsafe for the purpose of raising and lowering heavy parcels of lumber into the hold of said vessel; that, on account of and through said negligence and carelessness of the defendant's said servants, employees, and foreman, in the use of said defective sling, while lowering said parcels of lumber through the hatch of said vessel, said sling broke and let said parcel of lumber fall, . . ."

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etc.; that the officers, foreman and servants of the defendant corporation well knew that said rope sling was dangerous, unsafe, and not sufficiently strong to carry a large parcel of lumber, such as the same was carrying at the time of the accident. The answer denied the material allegations of the complaint, and alleged affirmatively assumption of the risk and contributory negligence, on the part of the plaintiff. A verdict was returned for the plaintiff, and, from the judgment entered, this appeal is prosecuted.

The first error assigned is based upon the insufficiency of the complaint. As already stated, the complaint alleged that it was the duty of the appellant to furnish the very best, safest, and strongest slings available. This, of course, is not a correct statement of the legal duty imposed upon the appellant; but an erroneous statement of the law will not vitiate a pleading which is otherwise sufficient. We think the complaint sufficiently alleges a breach of the legal duty which the appellant owed to the respondent, and the complaint is therefore sufficient, especially after verdict.

The second, third, fourth, fifth, sixth, and seventh assignments are based upon exceptions to testimony offered by the respondent, and received over the objection of the appellant. By this testimony the respondent was permitted to prove that a rope sling is not a safe appliance to be used in loading lumber into a vessel, that rope slings are not in general use for that purpose, and that chain or wire slings are safer than rope slings. The court committed error in this regard, for two reasons; first, because, under a proper construction of the complaint, we think that the use of a defective or rotten rope is the only negligence charged; and, second, because the respondent was a stevedore of long experience, knew of the use of the rope sling, and of the dangers incident thereto, made no objec-

tions to such use, and, therefore, assumed all risk incident to the use of a proper and sufficient rope sling. This testimony was prejudicial to the appellant, for the reason that its tendency was to impose upon it a much higher degree of care than that imposed by law. This error was not cured by the instructions. While the court instructed the jury that it was the duty of the appellant to exercise reasonable care in the selection and use of the sling in question, the jury had a right to assume, from the testimony and the charge of the court, that a rope sling was under no circumstances a safe or proper appliance. In other words, the jury were not confined to the specific act of negligence charged in the complaint, by either the testimony or the instructions.

The eighth assignment relates to the admission of testimony tending to show that the sling was overloaded. While overloading the sling could not be proved as a distinct ground of negligence, as it was not alleged in the complaint, we think it was competent to show the kind of loads carried in the sling, for the purpose of showing negligence in the use of the defective or rotten rope complained of.

The ninth assignment is based upon the refusal of the court to direct a verdict for the appellant. Inasmuch as the case must go back for a new trial, we do not deem it proper to discuss the testimony on this appeal, further than to say that we think there was evidence before the jury tending to show that the rope used was defective and rotten, and that the appellant had notice of such defect, and the weight to be given such testimony was a question for the jury. Assuming that the appellant was negligent in the manner complained of, we cannot say, as a matter of law, that the respondent assumed the extra hazard re-

sulting from such negligence, or that he was guilty of contributory negligence, under the circumstances disclosed by the record.

For the error committed in receiving testimony, over objection, the judgment is reversed, and a new trial ordered.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ.,
concur.

Root and Crow, JJ., took no part.

[No. 5102. Decided March 6, 1905.]

STETSON & POST MILL COMPANY, *Appellant*, v. PACIFIC
AMUSEMENT COMPANY *et al.*, *Respondents*.¹

LANDLORD AND TENANT—LEASE—MECHANICS' LIEN—INTEREST OF LESSEE—FORFEITURE FOR CONDITION BROKEN—JUDGMENT—EXECUTION SALE—TITLE. Where a mechanics' lien was foreclosed against the leasehold estate of a tenant, who had erected a building on the leased premises, and before sale the lease was declared forfeited for non-payment of the rent, and the landlord recovered possession, an execution sale under the lien foreclosure, made after the re-entry by the landlord, conveys no title, although the lien holder was not a party to the decree forfeiting the lease; since performance, or tender of performance, of the lease, before peaceable re-entry for condition broken, was essential to prevent a forfeiture of the leasehold estate upon which the judgment was a lien.

Appeal from a judgment of the superior court for King county, Morris, J., entered September 19, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to recover the possession of real and personal property, and for damages. Affirmed.

¹Reported in 79 Pac. 935.

J. W. Rayburn and *William H. Brinker*, for appellant.

John E. Humphries and *Harrison Bostwick*, for respondents.

FULLERTON, J.—In this action the appellant sought to recover possession of certain real and personal property, situated in the city of Seattle, together with the sum of \$10,000, as damages for its wrongful detention, and the sum of \$750 per month for some twenty-five months, as its rental value. The facts out of which the action arises are, in substance, these: On February 23, 1898, Amos Brown and Annie M. Brown, his wife, and J. D. Lowman and Mary R. Lowman, his wife, being then the owners of the real property above mentioned, leased the same to Ida M. Cort, for a term of five years, at a rental of \$200 per month for the first two years of the term, \$250 per month for the third year, \$275 per month for the fourth year, and \$300 per month for the fifth year; all of such rentals being payable monthly in advance. The lease also provided that Mrs. Cort should have the privilege of erecting a brick building on the land, at her own cost, she agreeing to keep the same free from liens of all kinds and surrender the same, at the expiration of the lease, as the property of the lessors. The lease also contained covenants for the payment of such taxes as might be assessed against the property, that the leasehold interests should not be assigned without the consent of the lessors, and a reservation of the right of re-entry, on the part of the lessors, in case the rent or taxes should not be promptly paid when due, or the conditions of the lease should otherwise be broken.

On the day following the execution of the lease, Mrs. Cort mortgaged all of her interests to one J. B. Parsons for \$10,000, and at once entered into a contract for the erection of a building on the leased lands. At about this time,

certain persons incorporated the American Amusement Company, and on March 9, 1898, some fourteen days after she had procured the lease, Mrs. Cort, with the consent of the lessors, sold and assigned all of her right, title and interest in the leasehold estate to that company. From that time on, Mrs. Cort neither had, nor claimed to have, any interest in the leased premises. The American Amusement Company entered into possession of the property, immediately after purchasing Mrs. Cort's interests, and continued in such possession until August 29, 1898, at which time it was placed in the hands of a receiver, at the suit of one of its creditors. The receiver, by order of the court in which the receivership suit was pending, subsequently sold the leasehold interest to one E. P. Edsen, who, in turn, entered into possession of the property.

In the meantime, none of the rents reserved for the lease of the property had ever been paid, save the sum of \$600, paid on the execution of the lease. The lessors, after the property had been assigned to Edsen, served the statutory notice on him, and also upon Ida M. Cort and the American Amusement Company, requiring them to pay the accrued rents within ten days, or surrender the premises. This notice was not complied with, whereupon the lessors instituted an action against them to recover such possession, and forfeit and set aside the lease. This action was prosecuted to judgment in January, 1900, the court adjudging the lease forfeited and the lessors entitled to possession. The lessors immediately re-entered, and on the 1st of February, 1900, leased the property to the Pacific Amusement Company for a term of eight years from and after that date. This last named company entered at once into possession of the property, and was in possession thereof at the time of the commencement of the present

action, and had, in the meantime, expended, in completing the structure begun thereon, nearly \$70,000.

The appellant, between the 17th day of April, 1898, and the 17th day of June, 1898, furnished to T. W. Jones, the contractor of Ida M. Cort, above named, materials to be used in the construction of a building on the leased premises, of the value of \$1,185.12, and, on the 18th of August, 1898, filed a lien on the lands and building, for the amount of the purchase price of the materials, so furnished by it. This lien it afterwards sought to foreclose, making parties defendant, in its action, the lessors of the premises, together with Ida M. Cort, J. B. Parsons, and certain persons who had filed liens on the premises. Other parties, including the receiver of the American Amusement Company, afterwards intervened. The lessors appeared and successfully resisted the foreclosure, as against the fee of the lands, recovering their costs against the appellant and the other lien holders who sought to make their liens a charge against the fee. The court, however, in that action adjudged that the lien claimants were entitled to liens on the leasehold interest of Ida M. Cort, and entered a decree of foreclosure against such leasehold interest, determining therein the respective amounts due the several claimants, and directing that the leasehold interests be sold to satisfy the same. This judgment was entered on June 7, 1899. On January 26, 1901, more than one year after the lessors had entered into the possession of the premises, and nearly one year after the Pacific Amusement Company had held the property, the appellant issued an execution on its judgment of foreclosure, and caused the interest of Ida M. Cort therein to be sold, which was bid in by the appellant for the sum of \$40. This sale was afterwards confirmed, whereupon the officers making the sale executed a

deed to the appellant, conveying to it all of the interests of Ida M. Cort in and to the premises, and the building erected thereon. It is on the title acquired by this sale that the appellant bases its right to recover in this action.

The trial court held, on the facts as stated, that the appellant acquired no title by its foreclosure and sale, and had none when it commenced this action, and hence had no right to recover either the possession of the leased premises, or damages by way of rentals or otherwise, for its detention. We think the judgment of the trial court is right. By a foreclosure and sale, the appellant could acquire no greater rights in the leasehold estate than the persons against whom the foreclosure was had possessed therein (*Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123); and all such rights as the lessee, or her successors in interest, acquired by the lease had been forfeited and terminated, long before the sale under the judgment of foreclosure was made. Conceding that the appellant was not bound by the judgment of forfeiture, because not a party thereto, still its right to sell was barred by the peaceable re-entry of the lessors, for a breach of the covenants of the lease. Such re-entry, being for condition broken, was lawful, as against all persons claiming under the lease, and operated as a forfeiture of the rights of all such persons. It was essential to the rights of the appellant that the leasehold estate be preserved, and if it desired to prevent a forfeiture of such estate, and the consequent forfeiture of its own rights, as a lien claimant against such estate, it was necessary that it perform, or tender a performance of, the condition of the lease, before the lessors re-entered for default of such performance. As it did not perform, or tender performance, before that time, it cannot now recover damages by way of rentals or other-

wise, merely because the lessors refused to let it occupy the premises for the balance of the leased term.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW JJ., took no part.

[No. 5315. Decided March 6, 1905.]

P. C. ELLSWORTH, *Respondent*, v. F. W. LAYTON *et al.*,
Appellants.¹

MECHANICS' LIENS—DATE OF COMPLETION OF WORK—SUPPLYING OMISSIONS AFTER ACCEPTANCE OF BUILDING. Where a building was accepted as completed in October, and a mechanics' lien was not filed until April, findings to the effect that the lien was not filed within the required time after the completion of the building are sustained, notwithstanding that, on January 6, metallic flashings, that had been inadvertently omitted, were put over six windows on the demand of the owner, and on February 16, certain drain tile was relaid, where it appears that such work was in the nature of repairs to remedy defects not apparent at the time of the acceptance of the building.

APPEAL AND ERROR—REVIEW—OBJECTIONS—SUBSTITUTION OF PARTIES WITHOUT AMENDING PLEADINGS. Error cannot be predicated on the failure to amend the pleadings at the time of making a substitution of parties, when no objection thereto was made in the court below.

APPEAL AND ERROR—REVIEW—PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. In an equity case, tried *de novo* in the supreme court, an insufficient pleading will be considered amended to conform to the proof.

Appeal from a judgment of the superior court for King county, Bell, J., entered April 2, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

¹Reported in 79 Pac. 947.

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Citations of Counsel.

There was testimony tending to show that the building was turned over and accepted as completed in October. On January 6, upon the demand of the owner, the contractor put metallic flashings over six windows that had been inadvertently omitted, and on February 13, certain drain tile was relaid. There was testimony tending to show that this work was to remedy leaks that had developed at the windows and in the drain, and was in the nature of repairs to remedy defects in the work that were not apparent at the time of the acceptance of the building.

Wilshire & Kenaga, for appellants, contended, among other things, that the acceptance of the building did not constitute a completion of the contract. *Orlandi v. Gray*, 125 Cal. 372, 58 Pac. 15; *Mitchell v. Williams*, 80 N. Y. Supp. 864; *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734; *Utah Lumber Co. v. James*, 25 Utah 434, 71 Pac. 986. The doing of the work and not its acceptance fixes the date when the limitation for filing the lien commences to run. 20 Am. & Eng. Ency. Law (2d ed.), 396; *Jones v. Kruse*, 138 Cal. 613, 72 Pac. 146; *General Fire Ext. Co. v. Chaplin*, 183 Mass. 375, 67 N. E. 321; *Washington Bridge Co. v. Land & River Imp. Co.*, 12 Wash. 272, 40 Pac. 982; *Joralmon v. McPhee*, 31 Colo. 26, 71 Pac. 419. Whatever is necessary to complete the work under the specifications is work done under the contract, and the limitation does not begin to run until the last item is furnished. *General Fire Ext. Co. v. Schwartz Bros. Com. Co.*, 165 Mo. 171, 65 S. W. 318; *Farnham v. Richardson*, 91 Me. 559, 40 Atl. 553; *McIntyre v. Trautner*, 63 Cal. 429; *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1, 25 N. E. 1060; *Minneapolis Trust Co. v. Maxfield*, 81 Minn. 28, 83 N. W. 463; *McCarthy v. Groff*, 48 Minn. 325, 51 N. W. 218; *Cole v. Uhl*, 46 Conn. 296; *Stidger v. McPhee*,

15 Colo. App. 252, 62 Pac. 332; *New England etc. Co. v. Oakwood St. R. Co.*, 75 Fed. 162. It is immaterial that the amount of the last work done is small, if it is done on the demand of the owner, claiming that the contract had not been fully performed. *Farnham v. Richardson*, *supra*; *McLean v. Wiley*, 176 Mass. 233, 57 N. E. 347; *Miller v. Wilkinson*, 167 Mass. 136, 44 N. E. 1083; 20 Am. & Eng. Ency. Law (2d ed.), 398, note 12. The time for filing the lien begins to run from the date when defects and omissions are supplied by the lien claimant. *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695; *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762; *Jeffersonville Water Supply Co. v. Riter*, 138 Ind. 170, 37 N. E. 652; *Worthen v. Cleaveland*, 129 Mass. 570; *Nichols v. Culver*, 51 Conn. 177; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Gordon Hardware Co. v. San Francisco etc. R. Co.*, 86 Cal. 620, 25 Pac. 125; *Riggs Fire Ins. Co. v. Shedd*, 16 D. C. App. 150. The owner is estopped to assert that the contract was completed before additional work demanded by him was performed. *Minneapolis Trust Co. v. Great Northern R. Co.*, 74 Minn. 30, 76 N. W. 953; 20 Am. & Eng. Ency. Law (2d ed.), 399.

Roberts & Leehey, for respondent. Where a building is accepted as completed, repairs by the contractor on a discovery of defects will not extend the time for filing a mechanics' lien. *Avery v. Butler*, 30 Ore. 287, 47 Pac. 706; *Harrison v. Women's Homeopathic Ass'n*, 134 Pa. St. 558, 19 Atl. 804, 19 Am. St. 714; *Burleigh Bldg. Co. v. Merchant Brick etc. Co.*, 13 Colo. App. 455, 59 Pac. 83; *Central Trust Co. v. Chicago etc. R. Co.*, 54 Fed. 598.

PER CURIAM.—This action was brought by respondent Ellsworth, as assignee of one Munson, against H. J. Bailey and Edna Bailey, his wife, to recover judgment for

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\$2,000, with interest and costs, on two promissory notes, and to foreclose the mortgage of even date with said notes, upon lot 22, block 4, Capitol Hill Addition to the city of Seattle. Different parties who claimed interest in the land were made defendants, among them the appellants in this case. The particular manner in which the different parties to this action were brought into court is not material, for the pertinent question in the case is the right of the appellants to a lien upon the land sought to be foreclosed. The court found that the liens filed by the appellants were not filed within the statutory time after the completion and acceptance of the work for which the liens were filed. The work having been completed and accepted during the first days of October, and the lien being filed on the 3d day of April, the time at which the work on the building involved was completed is the question of fact which determines the appellants' rights in this case. That fact was found against the appellants by the trial court, and, from an examination of the record, we are satisfied that such finding was justified by the testimony in the case, and that the rights of the parties were properly fixed by the judgment of the court.

There is no merit in the contention that the judgment was invalid because the pleadings were not amended on behalf of the substituted parties. The parties appellant were represented at the time of the substitution, and made no objection thereto, at any time, and no request that the pleadings be amended. The assignments, and the testimony in relation to the same, were introduced at the trial without objection. No prejudice in any event could attach to the appellants, for the only question at issue was the priority of the liens. In addition to this, this court, in the trial of an equity cause, would consider an insufficient pleading as amended to correspond with the facts proved.

There seems to have been no exception taken to the finding of the court in relation to the separate property of Edna Bailey, and we are unable to understand in what way it affects the appellants' rights in this case, even if the court should have erred in regard to such findings.

There not appearing any error in the record, the judgment is affirmed.

[No. 5163. Decided March 6, 1905.]

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684

PEOPLES SAVINGS BANK, *Respondent*, v. J. R. LEWIS *et al.*, *Appellants*.¹

ESTOPPEL—MORTGAGES—COVENANTS—WARRANTY—AFTER-ACQUIRED TITLE—TIDE LANDS BELONGING TO STATE. A mortgage covering tide lands belonging to the state, which contains a covenant of seizin and general warranty against all lawful claims, conveys the after-acquired title of the mortgagor, secured through a state deed issued after the decree and foreclosure sale, upon an application for purchase made pending the foreclosure.

Appeal from a portion of a judgment of the superior court for King county, Tallman, J., entered November 23, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Ballinger, Ronald & Battle, for appellants. The after-acquired title was not subjected to sale by the decree of foreclosure. Jones, Mortgages (3d ed.), §§ 153, 1581, 1656. The purchaser at the sale is not presumed to have acquired the title for the benefit of the mortgagee. *Burton v. Reeds*, 20 Ind. 93. The purchase price accrued to the state subsequently to the foreclosure, and, as in the case of subsequent tax titles, the after-acquired title did not

¹Reported in 79 Pac. 932.

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inure to the benefit of the grantee. 11 Am. & Eng. Ency. Law (2d ed.), p. 412.

Lewis & Hardin and *Walker & Munn*, for respondent, cited: *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400; 11 Am. & Eng. Ency. Law (2d ed.), p. 405; *West Coast Mfg. etc. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97; *Osborn v. Scottish-American Co.*, 22 Wash. 83, 60 Pac. 49; 1 Herman, Estoppel, § 152; 2 Id., § 587; 11 Am. & Eng. Ency. Law (2d ed.), p. 394; *Douglass v. Scott*, 5 Ohio 195; *Van Renssalaer v. Kearney*, 11 How. 325; *Tefft v. Munson*, 57 N. Y. 97; *Powers v. Patton*, 71 Me. 583; *Jarvis v. Aikens*, 25 Vt. 635; *Knight v. Thayer*, 125 Mass. 25.

MOUNT, C. J.—This action was brought by the respondent to quiet title to lots 1, 2, 3, and 4, in block 204, and lots 1, 2, 3, 4, 5, 6, and 7, in block 206, of the Seattle tide lands, in King county. After the issues were made up, the trial was had, and the lower court entered a decree in accordance with the prayer of the complaint. The defendants appeal.

The facts are undisputed and are, briefly, as follows: On October 18, 1892, Howard H. Lewis and wife, Bessie J. Lewis, to secure a note for \$25,000, executed to the respondent a mortgage upon an undivided one-fifth interest in blocks 9 and 10, Terry's Fifth Addition to Seattle, together with other property. The mortgage contained the following covenant of title and warranty:

"To have and to hold the said premises, unto the said party of the second part, its successors and assigns, for its own use, benefit and behoof forever. The said parties of the first part hereby covenanting to and with the said party of the second part, its successors and assigns, that they are lawfully seized of said premises and now have a valid and unincumbered fee simple title thereto, and that

they will, and their heirs, executors, and administrators shall forever, warrant and defend the same against all lawful claims and damages."

Prior to the execution of the mortgage, a plat of Terry's Fifth Addition was filed for record by the owner, wherein said blocks 9 and 10 were marked, determined, and described with such particularity as to identify said blocks, so far as the same could be identified. At the time of the execution of the mortgage, a part of these blocks was tide land, belonging to the state of Washington, lying beyond the government meander line. The statutes then in force made provision for the preference right of purchase by upland owners. Bessie J. Lewis was the legal owner of an undivided one-fifth interest, as her separate property, in that portion of block 9 which was upland. The money for which the mortgage was given was loaned to her in full reliance upon the representations contained in the mortgage. On July 11, 1895, respondent sold and assigned said note and mortgage to James Goldsmith, who, on July 17, of the same year, commenced his action to foreclose said mortgage, which action resulted in the sale of the property covered by the agreement.

After the action was commenced, and before the decree was rendered, and on February 11, 1895, an official plat and map of the Seattle tide lands was filed in the office of the auditor of King county. In this plat lots 1, 2, 3, and 4, in block 204, are a part of, and included within, the lands theretofore known as block 10, in Terry's Fifth Addition; and lots 2, 3, 4, 5, 6, and 7, and the northerly twenty feet of lot 1, in block 206, are a part of, and included within, the lands theretofore known as block 9, of Terry's Fifth Addition. This map of the Seattle tide lands was filed on March 15, 1895, as provided by law, with the board of state land commissioners, and, also, with the commissioner of public lands of the state. All

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the lands included within the said blocks 204 and 206 are wholly without the government meander lines.

On the 22d day of March, 1895, Edward L. Terry, one of the tenants in common, made application to purchase all of the tide land blocks 204 and 206. His application purports to have been made for, and in behalf of, the heirs of C. C. Terry. The use of the words "heirs of C. C. Terry," was intended to be descriptive only of the persons who, as tenants in common, owned the upland portion of block 9, of Terry's Addition. The judgment in the foreclosure action was rendered on March 28, 1896, order of sale issued thereon March 30, 1896, and sale of all the mortgaged property was made to Goldsmith on May 1, 1896. The sale was confirmed on May 3, 1897, when the sheriff's deed was issued to Goldsmith, who conveyed the property to plaintiff on May 4, 1897. Thereafter, on December 31, 1897, the application of Edward L. Terry, as above stated, to purchase the lands was allowed, and tide land contract No. 1173 was issued to said Edward L. Terry, *Bessie J. Lewis*, *Nellie M. Scurry*, and *Mary C. Kittenger*, embracing lots 1, 2, 3, and 4, in block 204, and lots 1, 2, 3, 4, 5, 6, and 7, in block 206, according to the map of the Seattle tide lands. This contract was thereafter assigned to appellant *Bernard Pelly*, as trustee for the parties entitled to the lands. On August 20, 1898, defendant *Bessie J. Lewis* and *Howard H. Lewis* assigned to *J. R. Lewis* all their right, title, and interest in and to said contract, and the lands therein described. The appellant *J. R. Lewis* had notice of the mortgage, and all proceedings had thereunder. The assignment of the contract to him was made without the knowledge or consent of respondent.

Several questions are argued by appellants, but the controlling question in the case is, does the subsequently acquired title of the mortgagors inure to the benefit of the mortgagees and those claiming under them, when the mort-

gagors covenant that they are seized in fee and warrant against "all lawful claims and demands?" The affirmative of this question was settled by this court in the following cases: *Osborn v. Scottish-American Co.*, 22 Wash. 83, 60 Pac. 49; *West Coast Mfg. etc. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. 726. This being the rule, the judgment of the lower court was right. It is unnecessary, therefore, to discuss the other questions presented in the case.

The judgment is affirmed.

DUNBAR, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5005. Decided March 6, 1905.]

JAMES F. SLOANE *et al.*, Appellants, v. HENRIETTA M. LUCAS *et al.*, Respondents.¹

MORTGAGES—FORECLOSURE—PARTIES—HUSBAND AND WIFE—WIFE OF PURCHASER OF PREMISES. The foreclosure of a mortgage against community property transferred by the mortgagor, is void where the wife of the purchaser is not made a party defendant.

MORTGAGES—VOID FORECLOSURE SALE—MORTGAGEE IN POSSESSION. A purchaser or assignee in good faith under a void foreclosure sale becomes a mortgagee in possession.

MORTGAGES—INTEREST—INCREASED RATE AFTER MATURITY—BILLS AND NOTES. A stipulation in mortgage notes providing for an increased rate of interest after maturity, is valid.

SAME—INTEREST ON TAXES PAID. It is proper to allow twelve per cent interest upon taxes paid by the mortgagee where the mortgage provides therefor.

MORTGAGES—ACTION TO REDEEM—MORTGAGEE IN POSSESSION—VALUE OF IMPROVEMENTS—INTEREST UPON—RENTAL VALUE. In an

¹Reported in 79 Pac. 949.

37	348
41	329
37	348
42	401
42	402

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action for an accounting, brought by mortgagors, against mortgagees in possession under a void foreclosure, it is proper to allow the defendants for the value of their improvements, with interest thereon from the time they were made, where the plaintiffs are allowed the rental value of the premises at a rate increased by the improvements, and where the plaintiffs had knowledge that the improvements were being made in the full belief of the legality of the defendants' title, and made no claim to the land for more than three years thereafter.

SAME—FORM OF DECREE—INTERLOCUTORY ORDER FIXING TIME FOR REDEMPTION—EQUITY. In an action brought by mortgagors against mortgagees in possession under a void foreclosure, seeking to set aside the foreclosure decree and for an accounting for rents, it is proper to enter an interlocutory decree fixing 90 days within which the amount necessary to redeem from the mortgage debt shall be paid, and in default of such payment, dismissing the action and quieting the title of the defendants; since, either as an action to quiet title or to redeem, the plaintiffs must do equity before being entitled to relief against mortgagees in possession.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 28, 1903, upon findings of the court, after a trial on the merits without a jury, dismissing an action to quiet title and for an accounting. Affirmed.

Hartson & Holloway, for appellants.

Crow & Williams, for respondents.

HADLEY, J.—The prayer of the complaint in this action is for a decree declaring that certain mortgage foreclosure proceedings are void, quieting plaintiffs' title to the mortgaged premises, and awarding damages and rents for the retention and occupation of the land by the mortgagee and its successors in interest. The mortgage bore date March 1, 1890, and the principal note matured March 1, 1895. Default having been made in the payment of interest and taxes, the holder of the mortgage—being so authorized by the terms of the instrument—declared the whole debt due,

and in January, 1895, an action was commenced to foreclose the mortgage. Subsequently to the execution of the mortgage, and prior to the bringing of the foreclosure suit, the mortgagors conveyed the mortgaged land to James F. Sloane, who, by the terms of the conveyance, assumed the payment of the mortgage. The said James F. Sloane was, at the time, the husband of Ida H. Sloane, and the two were husband and wife when the foreclosure suit was brought. Ida H. Sloane was not made a party defendant in the foreclosure suit. Decree of foreclosure was rendered, and the land was sold thereunder to one Henry C. Townsend, who was then the holder of the mortgage.

The said James F. Sloane and Ida H. Sloane had actual knowledge of the foregoing facts, and, after said sale, they yielded possession of the premises to said Townsend, and occupied the land themselves as tenants of Townsend, paying him rent therefor. Thereafter Townsend conveyed the property to Henrietta M. Lucas, and the Sloanes at once recognized her as their landlord, and paid rent to her for the use of the premises. Later Mrs. Lucas desired to occupy the premises herself, and the Sloanes voluntarily moved out, and Mrs. Lucas entered into the occupancy of the land about August 1, 1898. Nearly four years thereafter, in June, 1902, the Sloanes brought this suit against Townsend and wife, Mrs. Lucas and husband, and the Holland bank, a second mortgagee of the premises.

After a trial, the court held that Mrs. Lucas is now mortgagee in possession, and that she is entitled to retain possession until she shall have been fully paid the entire amount of the mortgage debt and interest, together with taxes paid, and interest upon the same, and also the value of the improvements placed by her upon the property, with interest thereon; the plaintiffs, however, to be credited with the rental value of the property for the whole time since possession was taken by the purchaser at the sale. It was

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also held that plaintiffs were entitled to an interlocutory decree providing that, if within ninety days they should pay the amounts aforesaid, then they should be entitled to a final decree awarding to them the possession of the land, and quieting their title thereto, as against any claims by reason of said mortgage and foreclosure proceedings. It was, however, further held that, if such payment should not be made, according to the terms of such interlocutory decree, then the defendants should be entitled to a final decree dismissing the action, and adjudging Mrs. Lucas and her husband to be the owners of the land in fee simple, and quieting their title, as against the plaintiffs. Such an interlocutory decree was entered, and payment not having been made within said ninety days, or at all, a final decree was then entered dismissing the action, and adjudging that plaintiffs have no title, interest, lien, or equity in the land. The plaintiffs have appealed.

The said foreclosure sale was void within the rule declared by former decisions of this court, for failure to make party defendant the wife who was a member of the community holding the legal title to the land. It will therefore be seen, in the foregoing statement, that Mrs. Lucas is, in good faith, in possession as the successor in interest of a purchaser at a void foreclosure sale. Without discussing the additional facts and circumstances showing that possession was taken with the consent of appellants, it is sufficient to say that this court has held that possession, taken by virtue of a sale under void foreclosure proceedings, and held by the purchaser or his assignee, in good faith, constitutes such purchaser or assignee a mortgagee in possession. See *Investment Securities Co. v. Adams*, ante, p. 211, 79 Pac. 625. This question is extensively discussed in the briefs, but it is unnecessary that we shall again discuss it, since the case cited is decisive of the points raised here upon that subject.

It is assigned that the court erred in computing the amount of the interest due upon the principal note. The note provided for interest at six per cent per annum until maturity, and, if not paid on or before maturity, it was to draw twelve per cent per annum. The court computed interest at the rate of twelve per cent from the date the note matured. It is contended that this was contrary to the rule approved in *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. 415, 50 Am. St. 871, 28 L. R. A. 676. As we understand that case, the interest allowed by the trial court, and approved here, was computed exactly as was done by the trial court in the case at bar. The appellant there contended that he was entitled to interest at the increased rate for the whole time, but it was held that the allowance of the increased rate for the time before maturity would be in the nature of a penalty, and should not, for that reason, be allowed. But it was not held that the parties could not contract for a given rate until maturity and for an increased lawful rate to be computed from the date of maturity.

It is also urged that it was error to allow twelve per cent interest upon the amount of taxes paid by the mortgagee and its successors in interest. The court found that the mortgage provided for interest at the rate of twelve per cent per annum upon taxes paid, to be computed from the time of their payment. No attack is made upon the findings. The evidence is not here. Based upon that finding, the court did not err.

It is next contended that the court erred in charging appellants with legal interest upon the value of improvements placed upon the property by respondents. That equity required the allowance of the value of the improvements, under the circumstances, cannot be doubted. The court found that appellants had knowledge that the improvements were being made by Mrs. Lucas and her hus-

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band, under the full belief that they were the owners of the land in fee simple. No objection was made to the making of the improvements, and no claim was made, as against said respondents, until this suit was brought, more than three years after the improvements were completed.

"When the mortgagee makes permanent improvements, supposing he has acquired an absolute title by foreclosure, upon a subsequent redemption he is allowed the value of them, especially if the mortgagor has by his actions to any extent favored the mistaken belief." 2 Jones, Mortgages (6th ed.), § 1128.

Other authorities are cited by respondents upon this question, but we do not understand that appellants seriously contend against the allowance of the value of the improvements, but rather confine their objections to the allowance of interest upon this item. Having in view the circumstances above detailed, the court found the rental value of the property, from the time possession was first taken to the time the improvements were completed, and also found an increased rental value after the completion of the improvements. Respondents were then charged, and the appellants were credited, with the amount of such increased rental value. Inasmuch as appellants were given the benefit of the increased rental, by reason of the improvements, it would seem that equity would require that they should pay interest upon the actual value advanced by another, and which had made it possible for the property to yield the increased rental for appellants' benefit. Such was the rule followed in *Thomas v. Evans*, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519. We think the rule equitable and just, under the circumstances of this case, and the action of the trial court in this particular is approved.

The next contention is that the court erred in entering the interlocutory decree allowing but ninety days within

which to pay the money and redeem from the mortgage. It is insisted that the decree should have provided for sale, and for one year within which to redeem, as from an ordinary foreclosure sale. It will be remembered that respondents did not bring this action, but it was instituted by appellants. If it be treated either as an action in ejectment, or to quiet title against respondents, who were mortgagees in possession, then appellants are not entitled to relief without first offering to do equity by paying the amount due upon the mortgage, and also for taxes and improvements, less the rental value of the property. If it be treated as an action to redeem, then they must pay the amount necessary to redeem, or submit to a dismissal of the action. They cannot bring an action to compel respondents to foreclose the mortgage, since, by reason of the former defective foreclosure proceedings, respondents are mortgagees in possession. In an action to redeem from a mortgage, the judgment ordinarily provides that the plaintiff may redeem upon paying the amount due within a specified time; that, when payment is made within the time, the defendant shall discharge the mortgage and deliver up the mortgaged premises, and that, upon default in such payment, the complaint shall be dismissed. 2 Jones, Mortgages (6th ed.), § 1106. Such a decree was approved in *Martin v. Ratcliff*, 101 Mo. 254, 13 S. W. 1051, 20 Am. St. 605. The court there stated that, under the statutes of Missouri, a sale is contemplated in all foreclosures, as is true in this state; but it was observed that "there is a wide distinction between a suit of foreclosure and one brought to redeem from a voidable foreclosure sale." See, also, *Decker v. Patton*, 120 Ill. 464, 11 N. E. 897; *Cline v. Robbins*, 112 Cal. 581, 44 Pac. 1023; *Cowing v. Rogers*, 34 Cal. 648. In *Cline v. Robbins*, *supra*, the court observed as follows:

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"But the judgment is in form erroneous. It decrees that the mortgage be foreclosed, that the mortgaged premises be sold, and that out of the proceeds of the sale the amount found due from plaintiff to defendant be satisfied. It is in the usual form of a decree of foreclosure. But this was not an action brought by a mortgagee to foreclose a mortgage; it is, in substance, an action brought by a mortgagor to be allowed to redeem. In such an action the plaintiff cannot compel the defendant to foreclose, and in such a case the judgment should be that, upon the payment of the amount due, within a reasonable time to be fixed by the court, the mortgage shall be decreed to be satisfied, and that if, within such time, said money be not paid, the action should be dismissed."

Under the authorities cited, the court did not err in entering the interlocutory decree, and, inasmuch as there was no compliance with its terms, it was not error to enter the final decree dismissing the action.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5459. Decided March 7, 1905.]

ARCHIE CURTIS, *an Infant, by his Guardian ad Litem,*

J. E. CURTIS, *Appellant*, v. TENINO STONE

QUARRIES, *Respondent*.¹

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38	336

APPEAL AND ERROR—PLEADING—WAIVING ERROR BY PLEADING OVER. Error in striking out a portion of the complaint is waived by the filing of an amended complaint.

NEGLECT—DANGEROUS PREMISES—POWER HOUSE IN QUARRY—INJURY TO TRESPASSING CHILD. A power house in a quarry 200 yards from a public road, containing no dangerous machinery or device particularly attractive to children, does not come within

¹Reported in 79 Pac. 955.

the rule of the turntable cases so as to render the owner liable to a trespassing child, six years of age, who was injured in stepping through a hole in the floor of a platform covering the machinery.

SAME—TRESPASSERS—UNAUTHORIZED INVITATION. A child six years of age who enters defendant's power house at a quarry, of his own volition, just after being driven away by the engineer in charge, cannot be said to enter upon invitation, but is a trespasser, notwithstanding he may have been enticed there by two boys employed by defendant in manipulating the levers of the hoisting machinery, since they had no authority to invite strangers there, or to impose obligations on the defendant with reference to trespassers.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered June 17, 1904, upon the granting of a nonsuit, after a trial before the court and a jury, in an action for personal injuries sustained by a child in stepping through a hole in a floor covering dangerous machinery, in defendant's power house. Affirmed.

Govnor Teats and J. R. Buxton, for appellant, cited: *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 45 Am. St. 114, 27 L. R. A. 206; *Price v. Atchison Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. 625; *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, 46 Am. St. 216; 1 Thompson, Negligence, §§ 1027, 1040; Kinkead, Torts, p. 654; Buzwell, Personal Injuries (2d ed.), §§ 66, 67; Cooley, Torts (2d ed.), pp. 718, 719; Ray, Negligence of Imposed Duties, § 8; *Hydraulic Works v. Orr*, 83 Pa. St. 332; *Ollis v. Houston etc. R. Co.*, 31 Tex. Civ. App. 601, 73 S. W. 30; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; *Harriman v. Pittsburgh etc. R. Co.*, 45 Ohio St. 11, 4 Am. St. 507; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619; *Railway Co. v. Stout*, 17 Wall. 657; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269; *Chicago etc. R. Co. v. Fox* (Ind.

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Citations of Counsel.

App.) 70 N. E. 81; *Kansas City etc. R. Co. v. Matson* (Kan.), 75 Pac. 503; *Cook v. Houston Direct Nav. Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. 52; *Kinchlow v. Midland Elev. Co.*, 57 Kan. 374, 46 Pac. 703; *Houston etc. R. Co. v. Bulger* (Tex. Civ. App.) 80 S. W. 557; *Richmond etc. R. Co. v. Moore's Adm'r*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

Charles A. Riddle, for respondent, contended, among other things, that the doctrine of the turntable cases should not be extended. *Cooper v. Overton*, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. 864, 45 L. R. A. 591; *Heargreaves v. Deacon*, 25 Mich. 1; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. 615, 27 L. R. A. 724; *Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169; *Koester v. Ottumwa*, 34 Iowa 41; *Koons v. St. Louis etc. R. Co.*, 65 Mo. 592. The child was a trespasser and the defendant was liable only for gross or wanton neglect. *Matson v. Port Townsend etc. R. Co.*, 9 Wash. 449, 37 Pac. 705; *Williams v. Kansas City etc. R. Co.*, 96 Mo. 275, 9 S. W. 573; *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; *O'Leary v. Brooks Elev. Co.*, 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677; *Ratte v. Dawson, supra*; *Barney v. Hannibal etc. R. Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Clark v. Richmond*, 83 Va. 355, 5 S. E. 369, 5 Am. St. 281; *McGuinness v. Butler*, 159 Mass. 233, 34 N. E. 259, 38 Am. St. 412; *Nolan v. New York etc. R. Co.*, 53 Conn. 461, 4 Atl. 106; *Dicken v. Liverpool etc. Co.*, 41 W. Va. 511, 23 S. E. 582; *Morrissey v. Providence etc. R. Co.*, 15 R. I. 271, 3 Atl. 10. Even as a licensee, he took his own risk. *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115, 60 Am. St. 364, 36 L. R. A. 493; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Woolwine's Adm'r v. Chesapeake etc. R. Co.*, 36 W.

Va. 329, 15 S. E. 81, 32 Am. St. 859, 16 L. R. A. 271; *Straub v. Soderer*, 53 Mo. 38; *Benson v. Baltimore Traction Co.*, 77 Md. 535, 39 Am. St. 436, 20 L. R. A. 714; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 7 S. W. 756, 8 Am. St. 611; *Mathews v. Bensel*, 51 N. J. L. 30, 16 Atl. 195; *Fitzpatrick v. Cumberland Glass Mfg. Co.*, 61 N. J. L. 378, 39 Atl. 675. But under the circumstances of his entry, the proof establishes that he was a trespasser. *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340, 53 Pac. 345; *Oregon R. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Pac. 973, 26 Am. St. 860; *Missouri etc. R. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; *Twist v. Winona etc. R. Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. 626; *Chicago City R. Co. v. Wilcox*, 43 Am. & Eng. R. Cases (Ill.) 299; *Western etc. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320. The defendant is not liable without proof that it was aware of the danger in time to have avoided it. *Rine v. Chicago etc. R. Co.*, 88 Mo. 392; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Barney v. Hannibal etc. R. Co.*, *supra*; *Bishop v. Union R. Co.*, 14 R. I. 314, 51 Am. Rep. 386; *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337; *McEachern v. Boston etc. R. Co.*, 150 Mass. 515, 25 N. E. 231; *Central Branch etc. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167. There was no implied invitation. *Gay v. Essex Elec. St. R. Co.*, 159 Mass. 238, 34 N. E. 186, 38 Am. St. 415, 21 L. R. A. 448; *Zoebisch v. Tarbell*, 10 Allen 385, 87 Am. Dec. 660; *Holbrook v. Aldrich*, *Woolwine's Adm'r v. Chesapeake etc. R. Co.*, and *Benson v. Baltimore Traction Co.*, *supra*.

RUDKIN, J.—The defendant was, on the 29th day of August, 1903, and for a long time prior thereto, engaged in the business of quarrying stone for the market, near the town of Tenino in this state. In connection with its

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quarry, the defendant maintains a power house, in which are located engines, and other machinery, employed in the work of hoisting the stone from the quarry. The power house is situate in front of the engine room, and is so constructed that signals can be transmitted from the quarry to the operators in the power room. The machinery in the power room is beneath a platform, nine feet in width, and extending the entire length of the power room. This platform is constructed about four feet above the ground floor. The machinery is operated by a system of levers, extending through the floor of this platform, and connecting with the machinery underneath. These levers, at the time of the injury complained of, were operated by two boys about eighteen years of age. There was a three and one-half inch auger hole through the flooring of this platform, to enable the operator to see that the clutch below was working properly. This hole was within about five inches of the end of one of the planks, and, some two years prior to the accident, a piece of the plank, about two and one-half inches in width, split out from this hole to the end of the plank, and the floor was in this condition at the time of the injury in question.

On the date above mentioned, the plaintiff, an infant, of the age of about six years, was in the power house on this platform, and, in passing across the platform, his foot slipped through the opening above described, and was caught in the cog wheels, about eighteen inches below the platform, thereby causing injuries which necessitated the amputation of the foot. This action was brought to recover damages for the injury so inflicted.

The fourth paragraph of the original complaint was as follows:

"Plaintiff avers that it was the custom and habit of the employees of the said defendant in charge of said room, on and before the said 29th day of August, 1903, to invite

and induce children to come into the said room, and entice them upon the said premises by permitting them to blow the whistle of the steam engine, and that said defendant knew of the same; that on the 29th day of August, and for a long time prior thereto, children of the town of Tenino were permitted upon the premises and into the said room of the said defendant herein described, and permitted by the said defendant to blow the whistle and to do other things about said premises and room, and which had a tendency to entice children into the said room and upon the said defendant's premises."

On motion of the defendant, this paragraph was stricken, and an amended complaint filed, omitting the paragraph so stricken. At the trial in the court below a nonsuit was directed, at the close of the plaintiff's case, and from the judgment of nonsuit this appeal is taken.

The first error assigned is based on the ruling of the court striking the fourth paragraph of the original complaint. The second assignment is based upon the ruling excluding testimony tending to prove the allegations contained in the fourth paragraph, which had already been stricken. It is an established rule of practice in this court that an error in sustaining a motion or demurrer to a complaint is waived by pleading over. See, *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Prescott v. Puget Sound Bridge Co.*, 31 Wash. 177, 71 Pac. 772, and cases cited. For this reason, the court cannot consider the ruling on the motion to strike, or the rulings excluding testimony tending to prove the allegations stricken. We are not called upon to express an opinion as to the correctness of any of these rulings.

The only remaining assignment relates to the ruling of the court in granting the motion for a nonsuit, and, with the above questions eliminated, there is little or no merit in the appellant's case. The power house in question was the private property of the respondent, situate on its own

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grounds, at a distance of about two hundred yards from a public highway. The appellant was a trespasser in the building at the time of the happening of the unfortunate accident complained of, and his rights are dependent upon the law applicable to that class. His counsel earnestly insists that he should have been permitted to go to the jury upon two grounds: First, upon the theory of the law underlying the turntable cases, and cases of a kindred nature; and second, because the appellant was on the premises by invitation, express or implied, at the time of the injury.

We cannot accede to the first proposition advanced by counsel. We are not unmindful of the humane rule of law that forbids a property owner to leave unguarded dangerous machinery and dangerous places, which may be of such a character as to attract young children, or to allure them into danger; but the rule is not of general application, and cannot be extended to cases such as this. There was nothing alluring or attractive about these premises or machinery, nothing to invite children thither, and nothing dangerous about the place and machinery when not in use. In discussing this question in *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508, this court said:

"Appellant also cites what are known as the 'turntable cases.' These cases are based upon the theory that a turntable is a machine of such a nature as to attract children to play with it, and, being inherently dangerous for children to handle, negligence is predicated upon the failure to lock it or securely fasten it so that it cannot be moved by children. The same principle has been applied where other structures or conditions existed, but the doctrine has not been uniformly adopted by American courts, and it has, indeed, been severely criticised. In Beach on Contributory Negligence (3d ed.), § 51a, the author observes that the trend of the most recent decisions is against it, and many cases are cited. This court applied the rule in a turntable case in *Ilwaco Ry. & Nav. Co., v. Hedrick*,

1 Wash. 446, 25 Pac. 335, 22 Am. St. 169; but, in view of the more modern tendency of the courts, we should, however, hesitate to extend the rule as one of general application to other conditions. For especially forcible reasoning upon this subject we refer to *Delaware L. & W. R. Co. v Reich*, 61 N. J. Law, 635, 40 Atl. 682, 68 Am. St. 727, 41 L. R. A. 831. The respondent in the case at bar had not placed upon its premises a dangerous machine or device, that was in its nature and at once particularly attractive to children."

To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights. We are satisfied, therefore, that the respondent violated no duty it owed to the appellant as a trespasser upon its premises.

Was the appellant there by invitation, express or implied? He went there of his own volition. The engineer in charge of the engine room and power house drove him and his older brother from the engine room a short time before the accident. They next went to the power room, where the two boys above mentioned were operating the levers to raise the rock from the quarry. It may be conceded that these two boys talked with the appellant and his brother, and asked his brother to remain and blow the whistle at the close of work. These two boys were simply employees in the power house. They were not in charge of the building, and did not represent or act for the owner in any way. They had no authority to invite strangers there, or to impose burdens or obligations upon their employer, in so far as trespassers were concerned. There is no pretense that the appellant was invited there by any person authorized to speak for the respondent, or that any officer of the respondent had any knowledge of his

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presence. It is not claimed that any wanton or wilful injury was inflicted upon the appellant, and, therefore, none of his rights were violated, and no duty owed him was neglected or omitted.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ.,
concur.

ROOT and CROW, JJ., took no part.

[No. 5144. Decided March 7 1905.]

DORA MARSH DRASDO, *Respondent*, v. L. BECK,
Appellant.¹

CONTEMPT—TO ENFORCE CONTRACT RIGHTS—ORDER IN PROBATE FOR DELIVERY OF EXEMPT PROPERTY—WAREHOUSEMAN'S RECEIPT. Where in probate proceedings certain personal property, stored with a warehouseman by the deceased, was set aside as exempt to the widow, and order was made for its delivery to her, pursuant to which the warehouseman accepted from her the storage charges and issued her a warehouse receipt, she not wishing to remove the goods at that time, a subsequent delivery cannot be enforced by contempt proceedings for disobeying the order in probate, since the transaction was a constructive delivery and an independent contract enforceable in a proper action, and in no way connected with the order.

Appeal from an order of the superior court for King county, Bell, J., entered November 7, 1903, adjudging the defendant guilty of contempt of court, upon the hearing of an order to show cause. Reversed.

Willett & Willett, for appellant.

C. H. Farrell, for respondent.

¹Reported in 79 Pac. 948.

PER CURIAM.—L. Beck and J. Holden were the proprietors of the Queen City Carpet Cleaning, Storage & Repairing Company, a firm doing business in the city of Seattle. Paul Drasdo stored with said firm certain personal property belonging to him, and the same was in their possession at the time Drasdo died. After the death of Drasdo, the executors of his estate, the administrator of the estate of the community of which deceased was a member, and, also, the widow of the deceased, each demanded of said firm the delivery of said personal property. By reason of the several demands, a suit by way of interpleader was brought in said court by said firm, in which the various claimants were made parties. Pending such interpleader proceedings, and before the same had been heard, the court, in the probate proceedings, on the petition of the widow, made an order declaring said property as exempt to the widow, and setting it apart to her. It was also ordered that said Beck and Holden should deliver said property to the widow. Beck and Holden were not parties to the proceeding, and were in no way heard upon the matter prior to the making of such order. Upon being informed of the order, however, and upon demand of the widow, said Beck accepted from her payment for accrued storage charges, and issued to her a warehouse receipt for the goods, she not then wishing to remove them from the warehouse. Later the widow sought to remove the goods from the warehouse, and served upon Beck a certified copy of the aforesaid order, but her demand was refused. Thereupon the court issued, in the probate proceedings, an order directed to said Beck, requiring him to show cause why he should not be punished for contempt for not permitting the widow to remove the goods. He was adjudged to be in contempt, and has appealed from the judgment.

A number of questions are discussed in the briefs. We

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think it unnecessary to discuss the question that Beck was not bound by the order, on the theory that he was in no way before the court at the time it was made. Whether he was under any obligation, by reason of the order, to recognize Mrs. Drasdo's right to possession, becomes immaterial, since he in fact did so recognize it. He accepted from her the payment of storage dues and issued to her in her name a warehouse receipt. This constituted a constructive delivery to her, and formed the basis for a legal demand upon her part in a proper action. The acceptance of the storage dues, and the issuance of the warehouse receipt, amounted to a contract upon which Mrs. Drasdo could sue for possession and damages. But she was not entitled to invoke the aid of the court by way of contempt proceedings to enforce that contract. The contract was an individual affair between the two, and the court was in no way connected with it. We think the court erred in adjudging appellant guilty of contempt.

The judgment is reversed, and the cause remanded, with instructions to dismiss the contempt proceedings and discharge the appellant.

[No. 5500. Decided March 8, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE
MANDERVILLE, *Appellant*.¹

TRIAL—COMMENT ON FACTS—HARMLESS ERROR—HOMICIDE—SELF-DEFENSE—ADMITTED FACT. In a prosecution for a homicide, unlawful comment of the judge, at the time of the introduction of the evidence, in telling the jury that they must remember the evidence of a certain witness respecting the identification of a knife, is not prejudicial error, where the identification of the

¹Reported in 79 Pac. 977.

knife became immaterial and unimportant through the plea of self-defense, it being an admitted fact that the killing was done by the accused with a knife similar in appearance.

SAME—INSTRUCTIONS. In a prosecution for a homicide an instruction in the nature of a comment on the evidence, in that it assumed that witnesses had testified to incriminating circumstances, is not reversible error where that is a conceded fact in the case, the killing being admitted under a plea of self-defense, and where the jury were instructed to disregard all comments on the evidence; since unlawful comment on the evidence is not ground for reversal where it affirmatively appears that it was without prejudice.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—DEFINITION OF BEATING—HARMLESS ERROR. In a prosecution for homicide, where the plea was self-defense in avoiding a beating administered by the deceased, an instruction defining a "beating" as a functional derangement such as the blackening of an eye, while subject to criticism, will not be ground for reversal, where it appears from the evidence and other instructions that the accused was not prejudiced thereby.

SAME—RIGHT TO DEFEND AGAINST BEATING. In a prosecution for a homicide, an instruction to the effect that the right of self-defense does not justify one in killing an assailant who makes an assault without a deadly weapon with intent to administer a mere beating, is not prejudicial, where, with five or six other instructions on the subject taken as a whole, the law is fairly presented.

CRIMINAL LAW—IMPROPER QUESTIONS—OTHER ACTS—HARMLESS ERROR. In a prosecution for a homicide, permitting the state to ask if the witnesses had heard of the accused's engaging in other acts of violence, is not prejudicial where the witnesses answered in the negative.

CRIMINAL LAW—HOMICIDE—MURDER IN SECOND DEGREE—KILLING IN AFFRAY—EVIDENCE—SUFFICIENCY. In a prosecution for a homicide, where the deceased was stabbed by the accused in a saloon fight and the plea of self-defense is made, there is sufficient evidence to warrant a conviction of murder in the second degree, where it appears that there had been ill-feeling between the deceased and the accused, that there was talk of fight before the affray, that the accused was armed with a knife, and the deceased was unarmed and using only his fists, that they were about equal in physical ability, that the fight was of very short duration, and the deceased was severely cut in several places, that

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the accused admitted the cutting, and there was evidence that he had expressed the hope that it would result fatally; although there was conflict in the evidence as to how the fight started.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 20, 1904, upon a trial and conviction of the crime of murder in the second degree. Affirmed.

Frank S. Griffith, for appellant.

Kenneth Mackintosh and *Hermon W. Craven*, for respondent.

Root, J.—Appellant was tried upon an information charging him with murder in the first degree in killing one Edward McDeavitt, and was convicted of murder in the second degree, from which conviction he appeals to this court. The homicide for which he was prosecuted occurred in a saloon at Tolt. Appellant urged self-defense in justification of the killing. Appellant's version of the unfortunate affair was about this: He claims to have been standing with his back to the bar, his elbows resting thereupon, when he was attacked by the deceased, who struck him a heavy blow in the face, and followed it with several other blows and kicks, during which time appellant, with a knife, which he took from his pocket, stabbed his assailant several times, inflicting wounds from which he died a few hours afterwards.

In the course of the trial, one Nelson, a deputy sheriff, gave testimony as to a knife, which had been secured a couple of days after the tragedy at the home of one James Powers, who, it was claimed by the state, had furnished to appellant the knife with which the latter stabbed the deceased. Nelson testified that said knife was shown to the appellant, and that the latter had stated that he did not know whether it was the same knife he had used or not, but that it looked like it. He also testified that appellant

said he had gotten the knife of Jim Powell, in the saloon, the evening of the fight. Over the objection of appellant's counsel, this knife was admitted in evidence. Upon the appellant's counsel taking exception to the introduction of the knife, the trial court made this remark: "I want to say to the jury now, while it is fresh in my mind, that you must remember the testimony of Mr. Nelson touching this knife." To this remark appellant's counsel took an exception "as giving added weight to the testimony of one witness in this case and commenting on the facts." Thereupon the court made the following remarks:

"The jury are further instructed that any comments which the court may have made in this matter in reference to this man's testimony is not to give this witness' testimony more weight than other witnesses. You will not pay any attention to any comments which the court makes in ruling on testimony. You are the sole judges of the facts. I am only the judge of the law and you will judge the facts yourselves. I merely wanted to call your attention to this testimony at the time."

To these remarks, appellant's counsel took an exception, on the same grounds. Although doubtless made to protect appellant's rights, yet, had the identity of this knife become in any manner material in the determination of the issues submitted to the jury, these remarks of the trial court would present a serious question; but, in view of all of the facts in the case, the question of such identity became absolutely immaterial and unimportant. The evidence of the physicians, one of whom examined the deceased prior to his death, and both of whom examined the body soon thereafter, showed that death was caused by wounds inflicted by a knife, or similar sharp instrument. The evidence of the witnesses, for both the state and the defendant, showed that the cutting was done with a knife; and the defendant himself upon the stand admitted taking

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a knife from his pocket and opening it, and, from his own testimony, it was apparent that the cutting was done therewith. So, as we view it, the identity of this knife became a matter of no importance whatever in the case; and the remarks which the court made with reference thereto became incapable of causing any prejudicial results.

Numerous exceptions are taken to the instructions given. We will discuss the most strongly urged. One of these questioned instructions was in the following language:

"And in this case, if the jury believe that, prior to the publicity of the charge upon which the defendant is on trial, the defendant had always borne a good reputation in the community in which he lived for peace and quietude, then this is a fact proper to be considered by the jury with all the other evidence in the case in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken or have testified falsely or truthfully."

An instruction almost identical with this was held to constitute error in the case of *State v. Walters*, 7 Wash. 246, 250, 34 Pac. 938, 1098, on the ground that it was a comment upon the facts in that it, in effect, assumed and told the jury that witnesses had "testified to facts tending to criminate him." The same contention is made in this case. But, after careful consideration, we are convinced that, while this instruction is open to criticism, it nevertheless does not constitute reversible error in this case. An examination of the statement of facts shows that, among other instructions which carefully guarded the rights of the defendant, the trial court gave the following:

"Under the constitution and laws of this state, the jury are the sole judges of the facts, and the judge is prohibited from commenting upon the facts. Therefore, if in ruling upon objections, or in answering questions asked by counsel for either the state or defendant, or in any other way, or under any other circumstances, the court has commented

upon the testimony in this case, the court instructs you that you are to disregard entirely any and all such comment by the court, if any has been made."

In the case of *State v. Walters, supra*, it does not appear that this warning instruction was given. Moreover, in the case at bar, we think it affirmatively appears that the comment, if it be held to be a comment, was incapable of injuring the appellant. It was an established, conceded fact in the case that there *were* facts testified to, tending to criminate appellant. The interposition of the defense of "self-defense," necessarily implied the existence of evidence tending to criminate. The existence of proof of this kind would be the only occasion for appellant urging self-defense. The killing being admitted, and self-defense being the only justification urged before the jury, we feel that appellant was not prejudiced by an inadvertent remark of the court, assuming the existence of that which alone had made it necessary or proper for appellant to present this defense. Where an error is made which violates a constitutional provision, the judgment in a criminal case will ordinarily be reversed without a showing that said error did prejudice the rights of the defendant, unless the facts and circumstances be such that it affirmatively appears that such defendant was not, and could not have been, injured thereby. In the latter case, the object of the constitutional inhibition is nevertheless attained, the result provided against has not been produced, and the reason for such restriction in that given instance ceases to obtain. The object of constitutional limitations of the character involved, as well as of all rules of law applicable to cases of this kind, is to secure to a defendant a fair, impartial trial, where substantial justice to both the defendant and the state shall be meted out, as nearly as may be possible. Important considerations of public

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policy require that judgments of trial courts, in cases such as this, should not be overturned on account of errors which the record affirmatively shows to have been harmless. In the case of *State v. Surry*, 23 Wash. 655, 661, 63 Pac. 557, 559, this court, speaking by Anders, J., in referring to the case of *State v. Walters, supra*, and another case, said:

"While we are not disposed to overrule the prior decisions of this court as to the object and scope of this constitutional provision, we are not prepared to extend the rule enunciated in those cases so far as to hold that every casual, inadvertent or unnecessary remark made by the judge in reply to a proposition or suggestion of counsel constitutes a sufficient ground for reversing the judgment. In our opinion, it is only such remarks of the presiding judge during the course of a trial as might reasonably influence the mind of an ordinary juror that can justly be said to be inimical to the constitution. And whether error has been committed in a given case must, therefore, depend upon the particular facts and circumstances therein disclosed."

The appellant also takes an exception to a definition given by the trial court in the following words, to wit:

"A 'beating' or a 'mere beating,' as used in these instructions, is a functional derangement, such as the injury to an eye so as to blacken it, or even to the extent of closing it for a time."

We doubt the advisability of a trial court, in a case like this, attempting to define such expressions as "a beating," "a mere beating," "great bodily injury," or "great bodily harm,"—as they practically define themselves, and must usually be interpreted with reference to the particular case under consideration; and it is doubtful if the average juror is much enlightened by a definition given of them. In the light of the evidence in this case, and of the other instructions given, we do not believe the rights of the appellant

were infringed by the giving of this definition and instruction.

Appellant also complains of the following instruction:

"But a person upon whom assault is made, which is not felonious in its character, as one who is assaulted by another without a deadly weapon and with intent to inflict upon the person assaulted a mere beating, is not justified in killing his assailant; and a person upon whom a not felonious assault is made is not justified in repelling such an assault with a deadly weapon used in a deadly manner."

This instruction was accompanied by five or six others, explaining and bearing upon the subject of "self-defense;" and, in the light of these other instructions and the evidence in the case, we do not think appellant's criticism well founded. Because a certain instruction taken by itself is insufficient, defective, or not properly qualified, it does not necessarily follow that a case should be reversed. If the instructions, taken as a whole, fairly and fully present the law applicable to the matter in question, in such a manner as to make it clearly comprehensible to the jury, this is all that is required.

In the course of the trial, counsel for the state asked certain witnesses as to whether or not they had heard of appellant threatening, or engaging in, certain acts of violence towards certain other persons named. Each of these witnesses testified that he had not heard of any such occurrence. The asking of such questions is assigned as error, but we are unable to perceive any injury thereby to the appellant's cause.

Numerous errors are assigned in the matter of admitting or excluding evidence, and in the giving of numerous instructions and in the refusal of the court to give various instructions requested by the appellant. We have carefully examined all of these assignments, but are unable to find any prejudicial error. As they are all controlled by

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well established rules and principles of law, we feel that a discussion of them would serve no useful purpose.

Appellant contends that the evidence is not sufficient to sustain the verdict and judgment. We will call attention to some of the evidence, in addition to that heretofore mentioned. Appellant had married McDeavitt's sister some ten years ago, and on account of some matters pertaining to her, and perhaps on account of other matters, there was ill-feeling between deceased and appellant. Testimony was introduced showing serious threats upon the part of each against the other. Their estrangement, however, was not so pronounced but that they took one or two drinks together in the saloon, prior to the fight, on the evening thereof. The stabbing was practically admitted by appellant upon the witness stand. He admitted taking the knife from his pocket and opening the same, and said he supposed that he stabbed McDeavitt. Two or three witnesses testified that, subsequent to the affray, he admitted the cutting and expressed the hope that he had killed McDeavitt. The evidence showed that, a few minutes prior to the affray, there was some talk about fighting—this talk being indulged in by several persons. While there was considerable conflict in the evidence as to just who did the talking, and as to the exact language employed, yet it reasonably appears that both appellant and the deceased participated in such talk. As to just how the fight commenced, the evidence is contradictory. One or more witnesses said that McDeavitt, after talking fight, "hailed back" as if about to strike a man by the name of Barclay, and that appellant stepped suddenly forward toward McDeavitt, and the fight instantly commenced. Appellant and one or more witnesses claimed that he was standing with his back to the bar, his elbows resting thereupon, when the deceased suddenly threw off his hat and coat and started for him, striking him in the face and following it up with several blows and kicks. One witness tes-

tified that appellant, some days subsequent to the affair, told him that the knife was given to him in the saloon that evening by one Jim Powell, who told him to take it and cut McDeavitt's guts out. The fight was of very short duration. Appellant fell to the floor and, at that instant, McDeavitt called out that he was "cut to pieces," and exposed his body showing a wound in the abdomen from which his entrails were protruding. Three other severe wounds were subsequently found upon his body, all evidently made by the same instrument at the same time. The cutting took place at ten or eleven o'clock in the evening, and McDeavitt died next morning. There was no evidence, and no contention, that McDeavitt was armed, or that he was using, or attempting to use, anything but his fists in the fight. There were six or seven persons present in the saloon—some of them friends, and none of them, apparently, enemies of appellant. As between appellant and McDeavitt, there appears to have been no great disparity in size or physical ability. While there was a conflict in the testimony as to many things, yet we think that the verdict of the jury might almost be sustained upon the evidence of the appellant himself. The credibility of the witnesses was, of course, a matter for the jury; and, in view of the strong evidence given against the defendant by numerous witnesses, all of which evidence was for the jury to weigh and consider, we think the contention as to insufficiency of evidence cannot be sustained.

We have made a careful examination of appellant's brief, and the authorities therein cited, and given earnest consideration to the able argument made by his counsel before us. But we are unable to perceive that he has not had a fair trial, and been accorded substantial justice.

The judgment of the trial court is affirmed.

MOUNT, C. J., RUDKIN, DUNBAR, and CROW, JJ., concur.

FULLERTON and HADLEY, JJ, took no part.

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[No. 5483. Decided March 8, 1905.]

JANE WARD, *Respondent*, v. A. HINKLEMAN *et al.*,
Appellants.¹

LANDLORD AND TENANT—NEGLIGENCE—DANGEROUS PREMISES—REPAIRS—INJURY TO STRANGER—TENANT PRIMARILY LIABLE FOR—TENANCY. A landlord is not liable for injuries sustained by a stranger through a defect in an approach to a dwelling-house, included in the lease and under the exclusive control of the tenant, where there is no evidence that the defect existed at the time of the making of the lease, and in the absence of an express agreement to make repairs, since the duty devolves primarily upon the tenant.

SAME—TENANCY FROM MONTH TO MONTH—COMMENCEMENT OF TERM. In the case of a tenancy from month to month, the tenancy is deemed to be a continuing one, and the liability of the landlord for repairs depends upon the condition of the premises at the beginning of the first monthly tenancy.

Appeal from a judgment of the superior court for King county, Morris J., entered May 31, 1904, upon the verdict of a jury in favor of the plaintiff, in an action for personal injuries sustained in a fall through a defective approach to premises owned by defendants. Reversed.

Benson & Hall, for appellants.

Joseph M. Glasgow and *Crary & Ogden* for respondent.

RUDKIN, J.—On the 26th day of June, 1902, and for about eight months prior thereto, the defendants were the owners of certain real property, on Seventh street in the city of Seattle. On this property were situate five tenement houses, which were rented to different tenants, from month to month. For eight months prior to the above date, one of these houses was rented to a Mrs. Zufeldt. The latter house was constructed on piling, about eight feet

¹Reported in 79 Pac. 956.

back from the abutting sidewalk. There was a porch along the front of the house, extending about five feet toward the street, leaving a space of three feet between the porch and the sidewalk. This intervening space was covered with boards, one inch in thickness, attached to the porch at one end and to the sidewalk on the other.

A daughter of the plaintiff occupied a room or rooms in the Zufeldt house. On the above date the plaintiff called to visit her daughter, and, as she passed over this intervening space between the sidewalk and the porch, the boards gave way, precipitating her to the ground, some seven or eight feet below. As a result of this fall, the plaintiff was seriously injured. There was no written lease of the house in question, so far as the record discloses. Mrs. Zufeldt testified that she simply rented the house, and that the lots were used in common by all the tenants. There was no agreement for repairs between Mrs. Zufeldt and the defendants, but it appeared in evidence that the defendant A. Hinkleman was about the demised premises from time to time, collecting rent, viewing the premises, and making such repairs as he deemed necessary. This action was brought against the defendants, as owners of the property, to recover damages for the injuries caused the plaintiff by falling through the approach to the porch. Plaintiff had judgment below, and the defendants appeal.

The complaint alleged the ownership of the property by the appellants, and that the appellants had the management and control thereof, at the time of the injury complained of; that the flooring of the porch was rotten and defective; that the porch and the approach thereto were defective in construction, rendering them dangerous and unsafe to walk upon, and that the appellants had notice of their defective and dangerous condition, or, by the exercise of reasonable care and prudence, could and would have had such notice. The answer admitted the ownership of the prop-

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erty, but denied that the appellants had the management or control thereof, and alleged affirmatively that, at the time of the injury complained of, and for about eight months prior thereto, the house and premises were in the possession of Mrs. Zufeldt, as a tenant from month to month; that, during said time, said tenant had the exclusive possession and control of the premises; and that there was no contract or agreement between the appellants and their said tenant respecting repairs. The answer further pleaded contributory negligence. The affirmative defenses in the answer were denied, and, upon these issues, the case was tried.

The tenancy of Mrs. Zufeldt was admitted at the trial, and while she and other witnesses testified that she only rented the house, and that the other portions of the property were used in common by all the tenants, we entertain no doubt that the lease extended to and included the porch and the approaches thereto, that the house, the porch, and its approaches were under the exclusive control and dominion of the tenant, and that she was primarily liable for the repairs thereof. The liability of the landlord to third persons, for injuries from defective repair of demised premises, is thus stated in 18 Am. & Eng. Ency. Law (2d ed.), p. 238:

"As a general rule the landlord is not liable for injuries to third persons during the tenancy from the defective repair of the demised premises; and where the landlord has created no nuisance and is guilty of no wilful wrong, or fraud, or culpable negligence, he incurs no liability for any injury suffered by any person occupying or going upon the premises during the term of the demise, at the invitation or license of the tenant, such as members of the family, employees, guests, or customers of the tenant. This rule has been held to extend to the demise of a building used for public purposes. Where, however, at the time of the letting the premises are in a dangerous or unsafe condition

for the avowed purpose for which they are let, the landlord is liable for injuries to the person or goods of a third person lawfully upon the premises arising from such unsafe condition; and this is especially true where the building is let for a public entertainment. The reason for the rule holding the landlord liable to strangers for injuries from the dangerous condition of such premises at the time of the letting is that the landlord, by letting the premises in such condition, authorizes the continuance of such condition, and is therefore guilty of misfeasance."

Again, at page 240:

"Where at the time of letting the premises are in a proper state of repair, and they are permitted by the tenant to get into a condition dangerous to the public or to third persons, the landlord is not, as a general rule, liable to third persons for injuries caused therefrom during the tenancy."

Again, page 242:

"Where a landlord is sued by a third person for injuries caused by the dangerous condition of the premises, the burden is upon the plaintiff to show that such condition existed at the time of the letting."

The rule here announced is sustained by all the authorities. Shearman & Red., Negligence (5th ed.), § 708; Thompson, Negligence, § 1129, *et seq.* In *Kansas v. Brua*, 107 Pa. St. 85. repeated in *Fow v. Roberts*, 108 Id. 489, it is said:

"We do not doubt but that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises whilst in the possession of a tenant."

In *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775, Shaw, C. J., said:

"By the common law, the occupier and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be

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an express agreement between landlord and tenant, that the former shall keep the premises in repair, so that in case of a recovery against the tenant, he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair, may have his action in the first instance against the landlord. But such express agreement must be distinctly proved."

In *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310, this court held that, if premises are so constructed as to be entirely safe at the time of letting, the landlord is not responsible for damages flowing from improvements placed on the premises by the tenant after taking possession. In *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451, the court cites the following from *Shearman & Redfield on Negligence*, § 711:

"The liability of the landlord, however, exists only in favor of persons who stand strictly upon their rights as strangers. Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant, he, and not the landlord, is the person from whom they must seek redress for injuries caused by any defects in the premises;"

and says:

"This statement of the law by *Shearman & Redfield* is quoted in many cases where this question is raised, and can be conceded to state the general consensus of judicial opinion. It would be as unreasonable as it is unjust to hold the owner of manufacturing establishments responsible for all damages that might occur by reason of the machinery not being kept in proper repair by his lessee, when he by the very operations and conditions of the written lease could have no supervision over it. If such a responsibility would attach during a short lease it would also attach during a long lease, and as no prudent man could afford to run such risks, the practical result would be to deprive the owner of the right to lease his premises."

It is true the above language was used in reference to the lease of a shingle mill; but the same reasons apply in other cases, though perhaps with less force. See, also, *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193 12 Am. St. 778, 5 L. R. A. 449, and cases cited.

The cases cited by the respondent are in conformity with these views. They all concede that the liability of the landlord depends upon the condition of the premises at the time of letting, and not at the time of the injury, unless he is under contract to keep the demised premises in repair. There is nothing in the case of *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, 94 Am. St. 848, 59 L. R. A. 802, and the same case reported in 35 Wash. 449, 77 Pac. 732, inconsistent with these views. The question as to the duty of making repairs between the landlord and the tenant did not arise in that case, and was not passed upon. The injury in that case resulted from a defect in the property which was not included in the lease, and the duty to repair such property rested upon the landlord, and not upon the tenant.

The court below seems to have placed the liability of the appellants on the ground that a nuisance existed. We will not stop to inquire whether or not a mere defect in a private approach to a private residence can properly be classed as a nuisance, as the liability of the landlord for a nuisance is co-extensive with his liability for lack of repairs. The nuisance must have existed at the time of the letting, or the property must have been let for a purpose which would naturally create a nuisance, or the landlord must have assented to the creation of the nuisance. A mere defect, caused by a failure to repair after letting, where the premises were in proper repair at the time of letting, and where the duty to repair devolves upon the tenant, imposes

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no liability on the landlord, even though the lack of repair might in time create a nuisance. See authorities above cited.

Counsel further says that, assuming that Mrs. Zufeldt was in possession of the defective premises, she was merely a tenant from month to month, and there was, in contemplation of law, a re-letting at the beginning of each month. The legal fiction that there is a re-entry and a re-letting at the beginning of every month is too refined to meet our approval. It is true, our statute declares that where premises are rented for an indefinite time, with monthly rent reserved, the tenancy shall be construed to be a tenancy from month to month. But the statute further provides that the tenancy shall continue until terminated by a notice, and unless so terminated the tenancy is a continuing one.

"In case of periodical tenancies, the better doctrine seems to be that the tenancies for the several recurring periods are to be considered as constituting a continuing tenancy and not a renewal of the lease for each new period, and therefore the liability of the landlord depends upon the condition of the premises at the time of the beginning of the first periodical tenancy." 18 Am. & Eng. Ency. Law (2d ed.), p. 244.

For the foregoing reasons, the appellants were not responsible for the defective condition of the demised premises at the time of the injury complained of, and, inasmuch as no attempt was made to charge them with liability for such defect at any other time, the court should have instructed the jury, as requested, to return a verdict in their favor.

For this error, the judgment is reversed, with directions to dismiss the action.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 5074. Decided March 8, 1905.]

U. M. LAUMAN *et al.*, Appellants, v. A. HOOFER *et al.*,
Respondents.¹

JUDGMENT—RES ADJUDICATA—POSSESSORY RIGHT TO MINING CLAIM—NEITHER PARTY ENTITLED TO. A judgment in a former action to quiet title to the possessory rights of mining claims decreeing that neither of the parties were entitled to possession, is *res adjudicata* as to the parties and their successors in interest, as to their rights at that time, in subsequent litigation to quiet the title after a relocation of the claims.

MINES AND MINING—RELOCATION OF CLAIM—UNOCCUPIED LAND—FINDINGS—REVIEW. / Where, immediately after entry of a judgment that neither of the parties had any possessory rights to mining claims, the plaintiffs relocated the same and did the necessary assessment work, a finding that the relocations were upon unoccupied land, and entitled plaintiffs to possession, is sustained.

TRIAL—EQUITY—ADVISORY VERDICT—HARMLESS ERROR. The finding of a jury in an equity case is advisory, and any error in calling the jury is immaterial, where the court made findings supported by the evidence independently of the verdict.

Appeal from a judgment of the superior court for Skamania county, A. L. Miller, J., entered August 4, 1903, upon findings and an advisory verdict of a jury rendered in favor of the defendants, after a trial on the merits, quieting defendants' title to mining claims. Affirmed.

Reynolds & Stewart, for appellants.

Dell Stuart and *W. W. McCredie*, for respondents.

MOUNT, C. J.—This action was brought by appellants to recover a decree quieting their alleged possessory right to certain mining claims, located in Skamania county. The respondents, by their answer, denied any right of appellants to the property in question, and by cross-complaint alleged possessory right in themselves, and prayed for a

¹Reported in 79 Pac. 953.

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decree quieting their right to possession. By stipulation, the venue of the action was changed from Skamania to Clarke county, and the trial took place in the latter named county before the court and a jury, a jury being called as advisory upon one question of fact. After a trial, the court made findings of fact, and entered a decree in favor of the respondents. From this decree the appeal is prosecuted.

These facts are not disputed in the case. In the year 1898 the respondent Adolph Hooper and Victor Carlson brought an action against J. G. Copley and U. M. Lauman, for damages, for possession, and to quiet title to the same property now in dispute. In that action the defendants appeared and prayed for affirmative relief against plaintiffs, substantially the same as in this action. The action was tried, and it was later adjudged that neither the plaintiffs nor defendants in that action had any possessory rights to the mining claims in question. The judgment in that case was not appealed from. Immediately after the entry of judgment, the plaintiffs in that action relocated the mining claims, and have since that time had possession, and have done the required assessment work thereon. Since the date of this relocation, the said Copley died, and the appellants in this action have succeeded to his rights. The said Victor Carlson has also died, and his heirs at law have succeeded to his rights.

Under these facts, the judgment in the former case is clearly *res adjudicata* as to the original parties and their successors in interest, and binding against them. The only material questions, therefore, before the lower court, or to be considered now on this appeal upon the merits, are questions of fact which relate to the amount of assessment work done, and the validity of the last locations. Upon the evidence the trial court, we think correctly, found that the last relocations were made upon unoccupied government land, as required by the laws of this state and of the

United States, and that the necessary assessment work has been done by the respondents to entitle them to possession. There is no merit in the assignment that the court erred in calling a jury in Clarke county, or in submitting questions of fact to the jury, because it is agreed that this is an equity case and, therefore, the finding of the jury is merely advisory. The lower court made findings independent of the verdict, and these findings are amply supported by the evidence.

The judgment is affirmed.

DUNBAR, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5305. Decided March 8, 1905]

THE STATE OF WASHINGTON, *Respondent*, v. E.

PITTENGER, *Appellant*.¹

LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—PLEADINGS—COMPLAINT—ALLEGATION OF TITLE—SUFFICIENCY. In an action of forcible entry and detainer, a complaint alleging that the defendant entered premises as tenant of another, and that subsequently the premises were decreed to the plaintiff and that plaintiff is now the owner thereof, sufficiently alleges plaintiff's title, as against a demurrer, and that he was entitled to the rent, within Pierce's Code, § 1170.

SAME—JUDGMENT—RENT ACCRUING AFTER FILING OF COMPLAINT—PLEADING—SUPPLEMENTAL COMPLAINT. In an action of forcible entry and detainer in which the complaint demands judgment for the rent for specified months, the plaintiff is not entitled to judgment for rent maturing after the filing of the complaint, where no supplemental complaint was filed; and the amount found due as such rent cannot be sustained as damages, but the judgment is excessive to that extent.

PLEADINGS—AMENDMENT TO CONFORM TO PROOF. Where the defendant's demurrer to the complaint is overruled and he stands

¹Reported in 79 Pac. 942.

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Opinion Per HADLEY, J.

thereon, the judgment must be limited to the demand in the complaint, and amendments to conform to the proof cannot be made.

Appeal from a judgment of the superior court for King county, Morris, J., entered May 26, 1904, upon overruling defendant's demurrer to a complaint in forcible entry and detainer, awarding restitution and damages. Modified.

James M. Epler, for appellant.

Byers & Byers, for respondent.

HADLEY, J.—This is an action to recover possession of real estate, brought under our forcible entry and detainer statute. It is alleged that the administrator of the estate of Nellie Lawton leased the premises to the defendant for an indefinite time, at a monthly rental of \$25 per month, payable on the 1st day of each month, and that the defendant, by virtue of the lease, entered into the occupancy of the premises; that after the making of the lease, a decree of court was made whereby the premises were decreed to the plaintiff, and that plaintiff is now the owner thereof, and entitled to the rent. It is further averred that the rent for the months of March and April, 1904, became due and was unpaid; that plaintiff then served written notice upon defendant to pay the rent, or surrender the premises, which he refused to do for a period of three days thereafter, and still so refuses. Judgment is demanded for a writ of restitution, and for \$50 rent, and \$100 damages, the rent and damages to be doubled as provided by statute. The defendant demurred to the complaint, and the demurrer was overruled. He then stood upon his demurrer and refused to plead further, whereupon the court tried the cause without a jury, and rendered judgment for restitution of the premises, and for \$150. The defendant has appealed.

Appellant's first contention is that the demurrer should

have been sustained. It will be remembered that appellant entered upon the premises as tenant of another than the respondent, and the complaint alleges that, after that time, the premises were decreed to the respondent, and that respondent is now the owner and entitled to the rent. Respondent concedes that the complaint would have been subject to a motion to require a more definite statement in regard to the court proceedings leading up to such decree, but urges that it is sufficient as against demurrer. We think the complaint sufficient upon demurrer, in view of the direct averment as to ownership. It does not necessarily follow from the averments, as made, that the claim of ownership rests entirely upon the decree; but the fact of ownership is alleged, and also plaintiff's right to rent. It is insisted that the relation of landlord and tenant must have existed, and that the complaint does not show the said relation. Under our statute, Pierce's Code, § 1170, subd. 3, the action may be maintained by "the person entitled to the rent." As against demurrer, it is sufficiently alleged that respondent is such person.

It is insisted that the judgment is excessive. The court found that the rent was due and unpaid for the months of March, April and May, amounting to \$75 in all. The amount was doubled in the judgment as provided by statute, Pierce's Code § 1185. In the complaint the amount of rent in default is fixed at \$50 for the months of March and April. The complaint was filed April 12, before the maturity of any demand for the May rent. It is urged that the amount of recovery must be limited to what was due when the action was brought, and to the demand contained in the complaint. It is the general rule that the amount of recovery is limited to the demand of the complaint, unless a supplemental or amended complaint shall be filed. No such complaint was filed here. We cannot

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regard the complaint as amended to correspond with proofs, for the reason that appellant was not before the court as to any demand for the May rent. When his demurrer to the complaint was overruled, he stood thereon. Thereafter he was not chargeable with notice of any demands except those contained in the original complaint. We cannot assume that he would not have answered and defended against the May rent, if he had had notice that such demand would be made. The amount cannot be classified as damages, for the reason that the court did not find any damages, but specifically found that the rent for the three months was due, then doubled the aggregate sum, and gave judgment accordingly. We think the court erred when it allowed recovery for the May rent. The amount—\$25—having been doubled, made the judgment excessive in the sum of \$50.

In all other particulars the judgment is affirmed, but the cause is remanded with instructions to modify the judgment by making the amount of recovery \$100. Appellant shall recover costs on appeal.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5308. Decided March 8, 1905.]

JACOB FURTH, *Respondent*, v. TOWN OF WEST SEATTLE *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—STREET RAILWAYS—FRANCHISES—FORFEITURE—EXCUSE FOR FAILURE OF CONTRACTOR—ACCIDENT OR INABILITY TO OBTAIN MATERIAL. Where a street railway franchise provided for a forfeiture of security unless "in case of . . . accident . . . inability to obtain material . . ." etc., it would seem that it was not a sufficient excuse to fail to construct

¹Reported in 79 Pac. 936.

the line, that the requirement of the United States government for costly drawbridges across public waterways for a connecting line was prohibitory of the enterprise.

SAME—FORFEITURE OF DEPOSIT—WRONGFUL APPROPRIATIONS—REMEDY—MINGLING WITH GENERAL FUND—TRUSTS—INJUNCTION. Where a certified check is deposited with a town clerk to be forfeited upon failure to comply with a street railway franchise, and, at the expiration of the time limited, the forfeiture is declared by the town council, and the check cashed and its proceeds mingled with the general funds of the town, without fraud on the part of the town, the proceeds are not held in trust nor can equity interfere, and injunction will not lie to prevent the amount from being drawn out of the general fund, the remedy for appropriating the check without right being an action at law.

Appeal from an order of the superior court for King county, Bell, J., entered June 2, 1904, after a hearing upon plaintiff's motion, granting a temporary injunction. Reversed.

Herbert N. DeWolfe and Bogle & Richardson, for appellants.

Piles, Donworth & Howe, for respondent, contended, among other things, that it was optional with the plaintiff to follow the fund as a trust or to sue for the same at law. *Breit v. Yeaton*, 101 Ill. 242; 2 Story, Equity Jurisp. (12th ed.), § 1262; *Hodges v. Bullock*, 15 R. I. 592, 10 Atl. 643; *Libby v. Hopkins*, 104 U. S. 303; *Kimmel v. Dickson*, 5 S. D. 221, 58 N. W. 561, 49 Am. St. 869.

PER CURIAM.—On the 3d of March, 1903, the town council of the town of West Seattle, a municipal corporation of the fourth class, passed an ordinance granting to Jacob Furth, his successors and assigns, a franchise to construct and maintain street railways in the town of West Seattle, which ordinance was approved by the council, and published as required by law. By section 8 of this ordinance, the grantee was required to construct and begin to operate, within one year, at least one single track railway

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on what is designated as route No. 1, and certain parts of other routes. The ordinance required the grantee to file his written acceptance of the rights, privileges, and franchises thereby granted, within thirty days thereafter; and further provided as follows:

"At the time of filing the written acceptance above provided for, said grantee, his successors or assigns, shall also file in the office of the town clerk a certified check, payable to the town of West Seattle, for the sum of \$2,000, as security, which check shall be forfeited to said town if said grantee, his successors or assigns, shall fail to comply with those provisions of section 8 hereof requiring the construction and beginning of operation of certain track within one year, unless said grantee, his successors or assigns, shall be entitled to further time as provided in section 12 hereof; and in case said grantee, his successors or assigns, shall comply with so much of said section 8 as requires the construction and beginning of operation of said track within one year, either within said one year, or within such further time as said grantee, his successors or assigns, shall be entitled to, as provided in section 12, hereof, then said certified check shall be returned to said grantee, his successors or assigns."

The following is the provision of section 12:

"In case said grantee, his successors or assigns, shall be prevented from doing any act or thing in this ordinance required to be done, by any suit or action in court, by any accident, act of God, inability to obtain material, act of town or of the public enemy, or by any strike or strikes, or by any mob violence, then the time within which such act or thing is herein required to be done shall thereby be extended by a length of time equal to the period during which any such interfering cause or causes shall hinder, or delay said grantee, his successors or assigns."

The respondent filed his written acceptance of the franchise and rights granted by this ordinance, on the second day of April, 1903, and delivered to the town clerk a certified check for \$2,000, payable to the town of West Seattle.

The railway was not constructed according to the provisions of the ordinance within twelve months from the grant of such franchise, nor was such construction commenced. On February 2, the grantee applied to the town council for an extension of the time within which to construct such line, but such extension was not granted. On the 5th day of March the council of the town of West Seattle passed an ordinance, reciting, in effect, that the grantee, Jacob Furth, had wholly failed, refused, and neglected to comply with the terms of the ordinance, and it was resolved that the town clerk be directed to deposit the \$2,000 certified check with the town treasurer, on the 6th day of March, 1904, and that the town treasurer be directed to deposit said certified check to the credit of the general fund of the town of West Seattle.

In accordance with such ordinance and resolution, the clerk turned over the check to the town treasurer on March 6, 1904, the treasurer collected the check, and the proceeds were commingled with the general funds in the hands of the town. At the time of this collection, the treasurer had a general balance of \$741.35 on hand. Other moneys came into the same fund, and warrants were paid out of the fund, but it is conceded that, at the time of the commencement of this action, the general balance exceeded \$2,000. It does not appear that, prior to the appropriation of the money by the city, the plaintiff had ever sought to withdraw the check, or had intimated a purpose to dispute the validity of the ordinance, or the right of the town to collect the check and use its proceeds. But after it had been so appropriated, notice was given to the city by respondent, protesting against covering the money into the town treasury, and notifying the city that, in case such action was persisted in, suit would be brought to protect his rights.

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On April 18, 1904, the council repealed the ordinance of March 3, 1903, granting said franchise. On May 17, of the same year, this action was commenced to recover \$2,000 from the town, and the town officials were joined as defendants. On June 2, on application of the plaintiff, an order was made enjoining and restraining the defendants, until the further order of the court, from paying out or otherwise disposing of the sum of \$2,000, being the proceeds of the check aforesaid, and from paying out, for any purpose, any money that would reduce the amount of money in the treasury of said town available for the return to plaintiff of the \$2,000, the proceeds of said check. From this injunction this appeal is taken.

The substantial allegation of the complaint, upon which the injunction was granted, was that a certain connecting line was required, which, if constructed, would cross certain waterways, the same being public navigable tide waters, controlled by the government of the United States, known as the East Waterway and the West Waterway; that, at the time of the passage of said ordinance and the filing of said check, it was contemplated that the United States authorities would permit the construction or use of a trestle, with drawbridges of light construction and low cost, across said waterways, and such was the contemplation of both parties; but, after the passage of said ordinance, it was determined and made known by the United States authorities that they required the construction of two very large and extremely costly drawbridges, namely, one over each of said waterways, costing enormous sums, to wit, \$175,000 each, and the cost of said drawbridges, if undertaken, together with other expenditures which would be required for the carrying out of said enterprise, including the construction of the line over the routes named in said ordinance, was in fact prohibitory; and it was asserted in the complaint that, by reason of these facts, the

failure of the plaintiff to construct, and put into operation, the line of railway, within said one year, was caused by accident and inability to obtain material, within the meaning of section 12 of said ordinance.

It is the contention of the appellants that the claim sued on was a claim such as should have been presented to the council for consideration, allowance, and audit, and that no presentation was alleged, and this is admitted by the respondent. It is also contended that, if respondent has any remedy against the city, it should be obtained through the medium of a straight action at law. It would seem to us that the averments of the complaint did not relieve the respondent from performing his contract, under the express provisions of section 12. It was for the contractor to put on foot inquiries concerning the cost of the construction of this road, and the bridges necessarily connected with it. The information which he now complains of, with reference to the action of the government, could no doubt have been obtained before, as well as after, the contract had been entered into. It is difficult to discuss the error alleged, however, without discussing the merits of the cause, as a discussion of the merits is indulged in by both appellants and respondent in their respective briefs.

But we are unable to discover any trust character in the check which was deposited for the benefit of the city, or any reason alleged in the complaint for the equitable interference of the court. There must be some force given to the provision in relation to the deposit and the forfeiture of the check. It was a provision for the protection of the city, agreed to by the respondent. The property in the check remained in the respondent until the year had expired. Then, if the conditions of the contract had been performed, it was to be returned to the grantee. If not, and no continuance were granted, it was to be forfeited to the city, and, if so, the property in it would certainly belong to the city. It seems to us that the contract was a

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simple one, easily understood and easily complied with, and at the expiration of the year, in the absence of the continuance, either the respondent had a right to a return of the check, or the city had a right to appropriate it. Otherwise the contract in relation to the check amounted to nothing.

It is insisted by the respondent that, while it is doubtless true that the depositing of the check under the provisions of the ordinance was entirely voluntary, it was, however, no more a payment to the city than the deposit of collateral with a bank is a donation of the collateral to the bank, and a waiver of all right to hold the bank as trustee in case it attempts to misappropriate the collateral. But the parallel would be logically maintained only where the collaterals were deposited with an express contract that they should be forfeited to the use of the bank, in case the original debt were not paid at its maturity. The check, under the terms of the contract, had been cashed, and the money had already been appropriated by the city, and had become indiscriminately commingled with other money belonging to the city, so that the particular money itself could not in any event be traced or followed; and, therefore, there was nothing for an injunction to rightfully operate upon; and, if the city had wrongfully appropriated the money of the respondent, it was available to him to sue the city for moneys had and received. There is no fraud on the part of the city alleged. It was acting on what it deemed were its rights under the contract, and, if it misinterpreted that contract and misconceived its rights it is responsible to the respondent in an action at law.

The judgment is reversed, with instructions to deny the injunction asked for.

[No. 5061. Decided March 9, 1905.]

GAYLORD W. THOMPSON,¹ *et al.*, Appellants, v. NARCISSA
PRICE *et al.*, Respondents.¹

MORTGAGES—FORECLOSURE—PARTIES—TRUSTS—DEEDS—CONVEYANCE OF FEE TO TRUSTEE. Where the owners of lands subject to a mortgage conveyed the same by warranty deed, in trust, "the same to be sold . . . and the proceeds thereof to be applied" to the indebtedness of the grantors, the balance of the proceeds, if any, to be returned to them, the entire fee passes to the trustee, the trust being personal and not running with the land, so that the *cestuis que trustent* are not necessary parties to an action to foreclose the mortgage, and their rights are cut off by foreclosure against the trustee while holding the title.

Appeal from a judgment of the superior court for Whitman county, Chadwick J., entered September 9, 1903, upon findings in favor of the defendants, after a trial before the court without a jury, quieting the defendants' title to real estate. Affirmed.

Ben F. Tweedy, P. W. Kimball, and T. D. Culver, for appellants.

Thomas Neill and Harvey & Welty, for respondents.

FULLERTON, J.—On September 1, 1889, W. B. Stephenson, Sophia V. Stephenson, his wife, W. M. Chambers, and Minnie E. Chambers, his wife, being then the owners in fee, as tenants in common, of certain described real property, situate in Whitman county, in this state, mortgaged the same to one Richard W. Price, to secure the payment of a loan made them by Price, of the sum of \$4,000. Later on one LaFayette Williams became the owner of an undivided one-half of the property, through certain mesne conveyances from W. M. Chambers and wife, subject to the lien of the mortgage aforesaid; and on December 31, 1894,

¹Reported in 79 Pac. 951.

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his wife, Nettie C. Williams, joining in the deed of conveyance, he conveyed the same to the defendant L. B. McCarter. This last mentioned deed contained apt words of conveyance and covenants of warranty, and purported to convey all of the interest the grantors had in the premises, to the grantee, subject to a trust expressed in the following language:

"This land to be held in trust by the said second party, for the benefit of the town of Moscow, the same to be sold by said second party to the best advantage, and the proceeds thereof to be applied to any indebtedness owing by the said first parties, or either of them, or the Farmers' Bank of Moscow, Idaho, and after such indebtedness has been paid, then the balance, if any there be, to be returned to the said parties of the first part, to their assigns or legal representatives."

Subsequent to the execution of this deed, Richard W. Price foreclosed his mortgage, and caused the property to be sold, at which sale he became the purchaser for the amount of his mortgage debt, which then amounted to \$5,387.10. This sale was duly confirmed by the court, and a deed was issued to Price by the sheriff conducting the sale, which deed bore date of October 9, 1895. Price entered into possession of the property immediately after the sale, and held such possession, by himself and his tenants, until his death on January 8, 1899. Price left a will in which he bequeathed the property to his wife, Narcissa Price. Afterward Narcissa Price conveyed a part of the land to the respondents A. C. Atkinson and Mary J. Atkinson, who immediately entered into possession of the part so conveyed, and were in such possession at the time of the commencement of this action. The remainder of such land continued in the possession and ownership of Narcissa Price.

After the several conveyances herein mentioned, Williams and wife, claiming to have paid the indebtedness

mentioned in the trust deed, and to have become thereby entitled to a reconveyance of the property, conveyed it to the appellants, who bring this action to recover the same. The trial court ruled that the title to the entire tract became vested in Richard W. Price by the foreclosure proceedings; and the correctness of this ruling presents the principal question involved on this appeal.

It is the contention of the appellants that no title passed to Richard W. Price, to the undivided half interest in question, by virtue of the foreclosure proceedings, and hence none could pass to his successors in interest by his will, and the successive deeds of conveyance made thereafter. The argument is that the deed from Williams and wife to McCarter, being subject to a trust, did not pass the entire fee, and, as neither Williams nor his wife were made parties to the foreclosure proceedings, the fee was not cut off thereby, but remained in Williams and his wife, and passed to the appellants by virtue of the deed above mentioned from Williams and wife to them.

We cannot think this contention sound. The deed from Williams and wife to McCarter unquestionably passed the fee from the former to the latter. It not only contained apt words of conveyance, and covenants of warranty, but a positive admonition and direction to sell and convey the land in fee. To convey a fee the grantor must be possessed of a fee, and it is a contradiction in terms to say that McCarter could convey the land in fee to his grantees, but did not possess a fee himself. It may be that, had the title remained in McCarter, after his grantors had paid the debts intended to be paid by the grant, equity would have compelled a reconveyance of the land by McCarter to his grantors, or their successors in interest, but this does not prove that something less than a fee was conveyed by the deed of conveyance. Equity acts upon the person as well as upon things, and it would have compelled such con-

veyance, as being a personal obligation on the part of McCarter to deal equitably, not because of any interest the grantors retained in the land. This is made plain when it is remembered that equity would have acted in the same way with reference to the proceeds of a sale of the land, had McCarter sold it and retained the proceeds after his grantors had paid the debts from other sources. It would have compelled him to pay over the proceeds, not because the grantees retained any interest in the land which attached itself to the proceeds, but because of the personal obligation of McCarter to deal equitably. The trust created was a personal trust, not one that ran with the lands, and whether McCarter conveyed the land voluntarily, or whether it was taken away from him by virtue of a superior title, all of the interest his grantors had therein would have passed, and such grantors could not recover it from those lawfully acquiring it through McCarter. There was in these lands, therefore, no such interest retained as would require McCarter's grantors, or the intended beneficiaries of the conveyance, to be made parties to a foreclosure suit in order to pass the fee in the lands at the foreclosure sale.

It is not a universal rule of equity pleading that all persons interested in a trust estate, and whose rights may be affected by the final decree, must be parties to the suit. It has been held in Massachusetts, that, in a suit concerning the title to assets of an insolvent estate, it was not necessary to make the assignors or creditors parties, as the assignees had the legal title and the right to claim the property, and were authorized and empowered to represent the interests, and to act for all persons interested in the trust. *Stevenson v. Austin*, 3 Met. 474. So, in *Winslow v. Minnesota etc. R. Co.*, 4 Minn. 313, 77 Am. Dec. 519, it was said:

"And the principle seems to be well settled, that in an

action by a creditor to reach trust property, in the hands of administrators or trustees who have the control of, and whose duty it is to protect the property, the *cestuis que trustent* need not be joined as parties. The defence of the trustees is their defence, and their presence in court is not necessary to the protection of their interests."

In the case of *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843, the question was whether the creditors of an insolvent firm, in whose favor a deed of trust had been executed by the firm, were bound by a decree against the trustee, and that court held that:

"Where a trustee is invested with such powers and subjected to such obligations that his beneficiaries are bound by what is done against him or by him, they are not necessary parties to a suit against him by a stranger to defeat the trust in whole or in part. In such case, he is in court on their behalf; and they, though not parties, are concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party."

See, also, *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. 106, 31 L. Ed. 132; *Vetterlein v. Barnes*, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400; *Robinson v. Pierce*, 118 Ala. 273, 24 South. 984, 72 Am. St. 160, 45 L. R. A. 66; *Robertson v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, 15 L. R. A. 68.

So, here, if it were true that the grantors of McCarter had an interest in the property conveyed, such interests were cut off by the foreclosure suit in which McCarter was a party. Moreover, we think the statute has determined this question. It is provided that a trustee of an express trust may sue without joining the persons for whose benefit the suit is prosecuted. This being true, it would seem that the converse of the proposition would be true also; namely, that he could be sued concerning the trust property without joining the *cestuis que trustent*. See, *Mead v.*

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Mitchell, 5 Abb. Pr. 92; *Id.*, 17 N. Y. 210, 72 Am. Dec. 455.

Objection is made as to the sufficiency of the summons, but the questions raised were discussed and decided contrary to the objection, in *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385.

There being no error in the record the judgment appealed from is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5472. Decided March 9, 1905.]

A. O. BELTZ, *Appellant*, v. AMERICAN MILL COMPANY,
Respondent.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INJURY TO OPERATOR OF SAW—REMOVAL OF SAWDUST WITHOUT STOPPING SAW—NONSUIT. The operator of a re-saw, who is injured in removing sawdust while the saw was in motion, is guilty of contributory negligence, and a nonsuit is properly granted, where it appears that he could have stopped the saw for that purpose and obviated the danger, without stopping the other machinery in the mill, that the danger of removing the sawdust while the saw was in motion was open and apparent, and that in attempting to remove the sawdust without stopping it, he slipped and threw his hand into the saw.

SAME—EVIDENCE—OPERATION OF SAW—CROSS-EXAMINATION TENDING TO SHOW CONTRIBUTORY NEGLIGENCE. In an action for personal injuries sustained by the operator of a re-saw in attempting to remove sawdust while the saw was in motion, where the plaintiff testified at length as to the necessity of so doing, the mode of operation, and construction of the machine, it is proper to ask on cross-examination how often the saw was stopped to permit the removal of sawdust, and the manner of stopping the saw; and the fact that such evidence tended to show contributory negligence is not a valid objection thereto.

¹Reported in 79 Pac. 981.

Appeal from a judgment of the superior court, for Chehalis county, Irwin, J., entered July 15, 1904, upon granting a nonsuit, in an action for personal injuries sustained by the operator of a saw in attempting to remove sawdust while the saw was in motion. Affirmed.

Govnor Teats, for appellant.

J. B. Bridges, for respondent.

RUDKIN, J.—The defendant owns a sawmill at Aberdeen, and the plaintiff, on the 11th day of August, 1903, was in its employ, operating a re-saw used in the manufacture of lumber. This re-saw consists of a band-saw which runs upon two large wheels, one above, and the other below, the table used to receive the material to be re-sawed. The lower wheel is stationary, and is located down in the floor of the mill. The upper wheel is adjustable so as to keep the band-saw tight, in case of expansion through heat or other cause. The upper wheel is adjusted by means of weights attached thereto, and hung in a receptacle, which constitutes a portion of the frame of the saw. The sawdust drops into a pit in the vicinity of the lower wheel, and is carried off through a pipe. While this re-saw is in operation, the sawdust accumulates, more or less, beneath the receptacle containing the weights which adjust the upper wheel, and it becomes necessary to remove this dust, from time to time, so as to prevent its interference with the proper adjustment of the upper wheel. According to the testimony of the plaintiff, it is necessary to remove this sawdust four or five times a day. This can be done at noon or at night, or at other times when the machinery is stopped to change the saw or for other purposes. At other times, it must be removed while the saw is in operation, or the saw must be stopped for the purpose of removing the sawdust. From the testimony, it would probably

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be necessary to remove this sawdust two or three times a day while the saw is in operation, or to stop the saw for that purpose. This saw could be stopped without stopping or interfering with any other part of the machinery in the mill. The saw was stopped by means of a rope, attached some fifteen or twenty feet from where the saw was operated. To reach this rope the operator used one of the trucks employed in the mill. The saw was stopped in this manner by the plaintiff whenever necessary to change the saw, or for any other purpose. On account of the velocity of the saw, it takes it a considerable time to stop after the power is cut off.

The plaintiff always removed this sawdust without stopping the machinery, and saw other employees of the mill do the same. He was instructed to keep the receptacle clear of sawdust, but had no instructions as to how he should do it. On the above date, the plaintiff was clearing away the sawdust while the saw was in operation. He thus describes the manner in which he received the injuries complained of:

"I was kneeling down and went to take out that sawdust in there, and it threw the sawdust up in my face, and I threw my hand up like that (indicating by placing his hand over his eyes), and I kind of slipped and threw my hand into it. I went to clean out this sawdust in here; this band-saw was going around. I started to clean it out, and the sawdust started to fly up in my face, and I threw my left hand over my face like that (indicating by putting his arm across his eyes), and slipped at the same time, and threw my right hand out to catch myself, and threw my right hand into the saw."

In addition to the foregoing facts, the plaintiff alleged that the defendant had failed to safeguard this re-saw, as required by the laws of the state of Washington. The answer of the defendant denied negligence on its part, and pleaded affirmatively contributory negligence and assump-

tion of risk on the part of the plaintiff. The plaintiff demurred to the defense of assumption of risk, and the demurrer was sustained. At the trial a nonsuit was granted at the close of the plaintiff's case, and the plaintiff appeals.

As stated by counsel, the lower court granted the motion for a nonsuit on the ground that the appellant was guilty of contributory negligence. We think the judgment of nonsuit should be sustained. The complaint avers that it was dangerous to operate said re-saw, and to take the sawdust from said receptacle, but the appellant claimed in his testimony that he was not aware of such danger until the happening of the accident complained of. The court must consider, not only what the appellant knew, but what he should have known by a proper exercise of his faculties. As said by this court in *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679, and repeated in many subsequent cases:

"Men, when they are working around dangerous machinery, must notice. Their faculties and senses are given them for the purpose of self-preservation, and they must exercise them to a reasonable extent. . . . The dangers in this instance were apparent, and the law is well settled that an employee when he assumes his employment takes the risk of all apparent danger. This was the doctrine announced by this court in *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215, and *Jennings v. Tacoma Ry. and Motor Co.*, 7 Wash. 275, 34 Pac. 937, and is the doctrine of common justice and right between employer and employee, and the doctrine of common sense."

To the same effect, see *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *French v. First Avenue R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867. In the last case this court quotes with approval from the opinion in *Greef v. Brown*, 7 Kan. App. 394, 51 Pac. 926, as follows:

"She could not fail to see and understand the danger,

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for the reason that all the elements of it were wide open before her. The very thing happened which she knew was most likely to occur if she allowed her fingers to get between the cylinders, and no warning or caution could have increased her knowledge of the danger or the necessity for care. She therefore assumed the risk (*Luebke v. Berlin Machine Works*, 88 Wis. 442, 60 N. W. Rep. 711, 43 Am. St. 913,) and was guilty of contributory negligence; for the assumption of risk is a species of contributory negligence. This being true, it could make no difference even if plaintiffs in error had neglected reasonable precaution."

In *Steeple v. Panel & Folding Box Co.*, 33 Wash. 359, 74 Pac. 475, the court says:

"It is true the plaintiff testifies that he did not know that the platform was without a guard, but a plaintiff cannot recover simply by making a statement of that kind, if, under the circumstances, it was his duty, as a reasonably prudent man, to have made such an examination as would have resulted in the desired information. Yielding adherence to the statement often announced by this court, that, where the evidence shows that there could be any difference in the minds of reasonable men as to whether or not a plaintiff was guilty of contributory negligence, it is for the jury and not the court to enter into an investigation of, and decide, that question—we are of the opinion that the state of facts shown in this record precludes any such difference of opinion, and that it must be held that, as a matter of law, the plaintiff was guilty of contributory negligence."

In *Johnson v. Anderson etc. Lum. Co.*, 31 Wash. 554, 72 Pac. 107, the court says:

"We think, under the circumstances as stated by the appellant, that it was his plain duty to have stopped the running of the edger before attempting to clear out the chute in the dark, and that when it appears by a man's own statement that he attempted in the darkness, in a cramped place, such as this was described to be, to work around and with revolving saws and shafts, there cannot be any difference of opinion in the minds of reasonable

men as to whether or not he was guilty of contributory negligence. The negligence was so palpable that we think the court was justified in sustaining the motion for nonsuit."

Every case in which negligence or contributory negligence is charged depends so largely upon its own particular circumstances that the decisions in other cases are only important in so far as they lay down or establish general rules or principles. We think it can safely be said in this case that the danger of removing the sawdust from this receptacle with the hand, while the saw was in operation, was open, apparent, and obvious. The appellant, as a man of common understanding, knew and fully comprehended the likelihood of his hand coming in contact with a rapidly moving saw, and he knew that such contact could have but one result, and that was serious bodily injury to himself. There were two ways in which the sawdust could be removed, the one free from danger, the other fraught with danger. The appellant voluntarily chose the latter, and should not now be permitted to visit the result of his misfortunes and indiscretions upon others. In *Hoffman v. American Foundry Co.*, *supra*, this court said:

"There were two methods by which this could have been done, one of which was perfectly safe and the other beset with peril and danger. The rule is well settled that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous rather than the safe one, cannot recover for an injury thereby sustained. *Bailey, Master's Liability for Injuries to Servant*, p. 161, and authorities cited."

And this is the long established rule.

The appellant also assigns as error the ruling of the court in permitting certain questions to be asked on cross-examination. On his direct examination the plaintiff

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testified at length as to the construction of the machinery, the mode of operation, the necessity of removing this sawdust, how often it should be removed, the manner of removing it, etc. We think it was pertinent to ask the witness on cross-examination how often the saw was stopped so that the sawdust could be removed without danger, the manner of stopping the saw, etc. This testimony was connected with the subject matter of the direct examination, and the fact that it might tend to show that the appellant was himself guilty of contributory negligence is no valid objection to it.

In view of the conclusion we have reached on the question of contributory negligence, we deem it unnecessary to pass upon the question of the failure of the respondent to properly safeguard the machinery, or whether there was such failure.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 5460. Decided March 9, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES PEARSON, *Appellant*.¹

APPEAL—DISMISSAL—FILING OF STATEMENT AND BRIEFS. Motions to strike the statement and briefs and to dismiss the appeal for failure to file the same in time will be overruled where the statement was filed within time properly extended and the briefs were filed within 90 days after the appeal was taken.

WITNESSES—COMPETENCY—CONVICTION OF PERJURY. A witness convicted of cattle stealing, who acknowledges upon cross-ex-

¹Reported in 79 Pac. 985.

amination that he committed perjury, is not incompetent by reason of Bal. Code, § 5992, providing that a person convicted of perjury shall not be a competent witness in any case.

CRIMINAL LAW—CATTLE STEALING—TESTIMONY OF ACCOMPLICE—CORROBORATION—CAUTION TO JURY—INSTRUCTIONS. In a prosecution for cattle stealing, where a convicted accomplice admitted to having testified in a former trial to statements contradicting his present testimony, and there was no corroborating evidence, it is reversible error to refuse to give an instruction cautioning the jury against convicting the accused upon the uncorroborated testimony of an accomplice, and stating that the jury could not so convict where the accomplice admitted to testifying differently on a former occasion.

Appeal from a judgment of the superior court for Okanogan county, Martin J., entered May 23, 1904, upon a trial and conviction of the crime of cattle stealing. Reversed.

G. V. Alexander, for appellant.

E. K. Pendergast, for respondent.

CROW, J.—The appellant, James Pearson, was convicted of the crime of stealing cattle, was sentenced to a term of five years in the penitentiary, and appeals to this court.

Respondent presents a motion to strike the statement of facts, for the reason that the same was not filed and served within the time required by law. The record shows that a proper extension of time for filing the statement had been obtained, and that the statement was filed and served within such extended time. The motion is therefore denied. A motion is also made to strike appellant's brief, for the reason that the same was neither served nor filed within the time limited by law. The record, however, shows that it was served and filed within ninety days after the notice of appeal was given. The motion to strike the brief is denied, as is also a third motion made by respondent, to dis-

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miss this appeal, which third motion is based on the two previous motions above mentioned.

An information was filed on August 26, 1903, against the appellant, James Pearson, and also against one William Wilson and one Lewis Haley, charging them with the crime of stealing twelve head of neat cattle. The appellant, James Pearson, was tried separately, and convicted. It appears from the record, that one John Haley had previously been convicted in the superior court of Okanogan county, Washington, of the crime of stealing these same cattle; that he had been sentenced to a term of eight years in the penitentiary, and was serving said term at the time of the trial of appellant. Although John Haley had been tried on a separate information, nevertheless, the crime for the commission of which he had been convicted was the same crime charged against appellant, the claim of the state being that the act of stealing was the joint act of John Haley and the parties charged in this action. On appellant's trial, the said John Haley was presented as a witness for the state, having been brought from the penitentiary at Walla Walla for that purpose. Appellant objected to his competency as a witness, and moved the court to strike his testimony, basing his objection and motion on the fact that, as claimed by appellant, said John Haley was shown by his own evidence to be a self-confessed perjurer, and guilty of the crime of perjury. On his examination in chief, Haley testified in part as follows:

"Q. What is your name? A. My name is John Haley. Q. And your age? A. Twenty-four years of age. Q. Are you now confined in the penitentiary of this state? A. Yes, sir. Q. On a conviction of cattle stealing? A. Yes, sir. Q. What cattle? A. Tom Ellis's cattle. Q. This gentleman here, Thomas Ellis? (Indicating complaining witness.) A. Yes, sir. Q. Under what length of sentence are you? A. Eight years.

Q. How long ago were you sentenced? A. Pretty near two years; sentenced on the 25th of October, 1902."

On cross-examination he testified as follows:

"Q. You say you are serving a term in the state penitentiary at this time, Mr. Haley? A. Yes, sir. Q. For what offense? A. For stealing those cattle. Q. For stealing the cattle named in this information? A. Yes, sir. Q. How long a term are you serving there? A. I am serving eight years. Q. You were brought up from the penitentiary as a witness in this case, were you? A. Yes, sir. . . . Q. You testified at your own trial, did you? A. Yes, sir, I did. Q. And you denied, did you not, at that trial, that you had any connection with the stealing of these cattle? A. I did. Q. Or that you knew anything about the stealing of them? A. No, I didn't know anything about them at that time. Q. Didn't you deny that you had any connection or complicity with the stealing of these cattle? A. Yes, sir, I did. Q. You were under oath at that time? A. Yes, sir, I suppose so. I was on the stand. Q. Don't you know whether you were or not? A. I guess I was; I was on the stand. Q. You were under oath when you made that statement and testified, were you not? A. I suppose I was, yes. Q. Don't you remember whether you were sworn before you testified or not? A. Yes, sir, I was sworn. Q. And all the testimony that you gave at that time, in which you denied all connection with these cattle and the stealing of them, you want the jury to believe at this time was false, do you? A. Yes, sir, I do. Q. And that you committed perjury at that time when you testified? (Objection sustained.) Q. You testified at that time, did you not, Mr. Haley, with reference to the facts involved in this case, that is the stealing of these cattle? A. Well, I don't understand just what you are getting at now. Q. These are the same cattle that you were convicted of stealing, are they? A. Yes, sir, it is the same bunch of cattle."

.Section 5992, Bal. Code, reads as follows:

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"No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility: Provided, That any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed. or unless he shall have received a pardon."

Appellant objected to the competency of John Haley under this section, claiming that, although he had not been convicted of the crime of perjury, nevertheless he was shown by his own admissions to be a perjurer, and his testimony should be rejected. Appellant's objection was overruled by the trial court, and Haley's testimony was admitted. The learned counsel for appellant makes a very strong and forcible argument in favor of his contention that the witness Haley was incompetent, under said section 5992, citing, with others, the following authorities: *People v. Evans*, 40 N. Y. 1; *Dunlop & Meigs v. Patterson*, 5 Cowan 243; *Williams v. Bishop*, 17 Colo. App. 503, 68 Pac. 1063; 3 Ency. of Evidence, p. 779.

The case of *People v. Evans*, *supra*, seems to be the authority upon which appellant places the greatest reliance. But in that case the witness Near was practically the only witness produced against the defendant Evans, who was charged with the crime of subornation of perjury, in procuring Near to swear falsely on a material matter on the trial of a previous action. The prosecution depended solely on the testimony of Near, to show that perjury had been committed by himself in the previous action, and, also, that the defendant Evans had subornated him to commit such crime of perjury. There was no corroboration of Near's testimony on either of these two points. The trial judge refused to instruct the jury that they could not convict upon the uncorroborated testimony of Near that he

had committed the perjury at the instigation, and by the inducement, of the defendant Evans, and this was held to be error.

We do not think the principle announced in that case would justify us in holding that John Haley was incompetent as a witness in the case at bar, simply because he made admissions which would make him guilty of the crime of perjury. Section 5992 applies only to a person who shall have been *convicted* of the crime of perjury, meaning, undoubtedly, a legal conviction upon trial in a court of record. We do not feel ourselves at liberty to read into the statute words not already there, so as to give it a construction which would not be otherwise authorized. The legislature has not said that a witness is disqualified because he admits he has, at a former trial, sworn falsely as to the same circumstances constituting the subject matter of his evidence; but it has said such disqualification must be based upon a conviction of the crime of perjury. We do not think the witness John Haley was disqualified under the statute, and the court did not err in admitting his testimony.

The appellant excepted to the trial court's refusal to give the jury the fifth instruction requested by appellant, reading as follows:

"The witness John Haley, who has testified in this case, is an accomplice, and an accomplice is one who is associated with others in the commission of crime, all being principals. Haley has testified that he was associated with the defendant in stealing the cattle mentioned in the information, and that in law would make him an accomplice. The court instructs you that the testimony of an accomplice comes from a polluted source, and that, while the rule of law is that a defendant may be convicted on the uncorroborated testimony of an accomplice, where the honest judgment is satisfied beyond a reasonable doubt, still a jury should act upon

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such testimony with great care and caution and subject it to a careful examination in the light of other evidence in the case, and the jury should not convict upon such testimony alone, unless, after a careful examination of it, they are satisfied beyond all reasonable doubt of its truth. In many, if not in most, cases, the evidence of an accomplice, uncorroborated in material matters will not satisfy the honest judgment beyond a reasonable doubt, and it is clearly insufficient to authorize a verdict of guilty. Where an accomplice has been impeached by showing that he has testified differently at some other time with reference to the facts in issue, then in such case the jury cannot convict upon his uncorroborated testimony. And if you find that the witness John Haley has testified concerning the facts in issue in this case differently at another time from his testimony in this case, then you cannot find the defendant guilty on his uncorroborated testimony. The corroboration that the law requires for the testimony of an accomplice ought to be sufficient to satisfy the jury of the truth of the accomplice's testimony, and the corroboration must be as to some fact connecting the defendant with the commission of the offence, and is not sufficient if it merely shows that the offence was committed and the circumstances thereof."

The refusal to give this instruction, which was not given in any other substantial form, raises the question whether or not in this state a conviction can be had in a criminal action on the uncorroborated testimony of an accomplice, especially when such accomplice in giving such testimony flatly admits that, on a former trial, he testified to statements directly contradictory to those made by him in his later testimony given as such accomplice; or, in other words, when in his later testimony he makes admissions which would clearly show him to have been guilty of the crime of perjury. We have carefully examined all of the evidence in this case and, although it is contended in respondent's brief that the record shows evi-

dence in corroboration of the testimony of John Haley, we utterly fail to find any such corroborative evidence on any material fact in issue. The jury seems to have regarded the testimony of John Haley as worthy of credit, to have believed the same, and to have based its verdict thereon. We do not think an appellate court should invade the province of a jury and attempt to weigh the evidence of witnesses, or pass upon their credibility, but we may examine the record and ascertain whether, upon the evidence as presented and admitted, the jury was properly instructed as to the testimony given by an accomplice, as to how carefully the same should be weighed and regarded, and as to what corroboration of such testimony, if any, was necessary to warrant a conviction. .

"The state of the law as to the corroboration of accomplices is somewhat peculiar. It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal, . . . But while the law is thus fully established, the practice of judges is almost invariably to advise juries not to convict upon the evidence of an accomplice who is uncorroborated, and sometimes judges, where the testimony of the accomplice is the only evidence, take upon themselves to direct an acquittal of the prisoner." 1 Roscoe, *Criminal Evidence* (8th ed.), p. 201.

"In criminal trials, where the testimony of accomplices has been resorted to to procure convictions, it has been customary for judges presiding at the trial to instruct juries that it was ordinarily unsafe to convict upon the unsupported and uncorroborated evidence of the accomplice. Such instructions, however, have been merely advisory." 3 Rice, *Evidence*, § 321.

See, also, *Haskins v. People*, 16 N. Y. 344. In *Edwards v. State*, 2 Wash. 291, 306, 26 Pac. 258, 262, this court said:

" . . . it is true that we have no statute requiring

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the corroboration of an accomplice, such as is found in a few of the states. It is also true that at common law conviction upon the unsupported testimony of an accomplice was upheld to the extent, at least, that, although the higher courts and law writers laid it down that a trial court ought to advise the jury not to convict on such testimony, it was not reversible, even if they did not so advise. Yet the books are full of cases from courts not bound by any statute, both in England and America, where corroboration has been held necessary. 1 Amer. & Eng. Enc. Law, tit. 'Accessory,' § 18, p. 74. Cases are rare, indeed, where, if the prosecutor has the assistance of a willing accomplice, no corroborative testimony can be produced. In practice it is almost invariably attempted, and juries are told, as in this case, that unless there is corroboration they should acquit. Perhaps the true view of the matter is that in many, if not in most cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt, and that it is clearly insufficient to authorize a verdict of guilty. But there may occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible it could be satisfied from human testimony; and in such cases justice demands that the evidence be accepted, so far as the court is concerned."

See, also, *Rose v. State*, 2 Wash. 312, 26 Pac. 264. In *State v. Coates*, 22 Wash. 601, 61 Pac. 726, this court, in sustaining the instruction given the jury, held that in effect the trial court had told the jury it could convict upon the uncorroborated testimony of an accomplice, but had, at the same time, given the ordinary precautionary charge as to how the jury should act on such testimony. White, J., who wrote the opinion, however, does not attempt to overrule the doctrine of *Edwards v. State*, *supra*; but, in fact, after quoting a portion of the language con-

tained in *Edwards v. State*, and commenting upon the same himself, says:

"The jury was told to view the testimony of Kauffman [the accomplice] in the light of all the other evidence, and we will point out further on in this opinion other evidence sufficient to corroborate his testimony."

And such "other evidence" is discussed later on in the opinion.

In *State v. Concannon*, 25 Wash. 327, 65 Pac. 534, Reavis, J., in commenting on the instructions of the trial court relative to the testimony of an accomplice, quotes with approval from *Edwards v. State, supra*, and then, after directing attention to the fact that there was no substantial corroboration of the testimony of Dunlap, the accomplice, says:

"But, in the weight given to the corroborating testimony of the accomplice, we conclude that this case should fall under the rule stated in *Edwards v. State, supra*, and the judgment is reversed and the cause remanded for a new trial."

In *State v. Harras*, 25 Wash. 416, 421, 65 Pac. 774, 776, Mount, J., says:

"It is next urged that the instructions ignored the rule that, to justify a conviction, the testimony of an accomplice must be corroborated. By instructions No. 12, 13, and 14, the court submitted the question of the credibility of witnesses to the jury, and by No. 15 the jury are instructed under what circumstances the witness Kidwell would be an accomplice, and also under what circumstances he would not be an accomplice, leaving this question to be determined by the jury. The court further instructed the jury that, in case they believed the former, 'you should consider with greater care whether the story he has told on the witness stand is corroborated by any fact or facts testified to by other witnesses.' And again the jury are told: 'You should not, however, decide the case upon the testimony of Kidwell alone, but upon all the evidence be-

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fore you. You should give it all due and candid consideration. This seems to comply with the rule as laid down by this court in *State v. Coates*, 22 Wash. 601, 61 Pac. 726, and is as favorable to defendant as required in *Edwards v. State*, 2 Wash. 291, 26 Pac. 258, and *State v. Concannon*, ante p. 327, 65 Pac. 534."

A careful examination of these various Washington cases will show that at no time has this court overruled the doctrine announced in *Edwards v. State*, *supra*, as above quoted, and such examination will also show that, in every instance where a conviction secured on the evidence of an accomplice has been sustained, there appears to have been some corroborative testimony. While we do not now announce the doctrine that a conviction should be permitted in no case on the uncorroborated testimony of an accomplice, nevertheless we do hold that the trial court should carefully caution the jury in such cases in the matter of weighing such testimony, and should warn it against a conviction on such uncorroborated testimony. We think the refusal of the trial court to give the fifth instruction above set forth, which was requested by appellant, was reversible error.

There are many assignments of error made by the appellant, but in view of what has been heretofore said in this opinion, it is not necessary to discuss the same.

The judgment of the superior court is reversed, and the cause remanded with instructions to grant the appellant a new trial.

MOUNT, C. J., DUNBAR, RUDKIN, and ROOT, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 5465. Decided March 10, 1905.]

JOHN RUSSNER, *Appellant*, v. FRANCES P. McMILLAN,
Respondent.¹

PARENT AND CHILD—GUARDIANS—APPOINTMENT—QUALIFICATIONS—CUSTODY OF INFANTS—FATHER IMPROPER PERSON. After a decree of divorce for non-support awarding to the mother the custody of children between two and five years of age, the father, upon the mother's death, is not entitled to their custody and guardianship, where it appears that he was addicted to the use of liquor, was without a home or relatives to care for them, and was engaged as a waiter in a saloon, and had been in the habit of giving the children liquor; and a temporary appointment of their grandmother, who was found to be a suitable person, is proper and will not be disturbed where the trial court saw and heard the witnesses.

SAME—TEMPORARY GUARDIANSHIP—EQUITY POWERS OF COURT. Upon conflicting applications of a father and a grandmother for the guardianship and custody of young children, where the father appears to be unfit to have their custody, the judgment awarding the custody to the grandmother may properly be made temporary in its character, and the children made wards of the court, for the purpose of changing the guardianship if the father should reform in the future and furnish proper assurances of his qualifications, or if the guardianship of the grandmother should become unsuitable, and the equitable jurisdiction of the court may be invoked in such a proceeding.

SAME—EVIDENCE OF FITNESS OF GUARDIAN—ADMISSIBILITY. Upon an issue as to the fitness of a person to have the custody of children, it is proper to exclude evidence that one of the applicant's daughters had been arrested for vagrancy, where she had not had her custody or rearing and was in no way responsible therefor.

Appeal from a judgment of the superior court for King county, Hon. Austin E. Griffiths, Judge *pro tempore*, entered June 28, 1904, after a hearing on the merits of conflicting applications for appointment as guardian of minors. Affirmed.

¹Reported in 79 Pac. 988.

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Opinion Per Root, J.

Geo. M. Sinclair, for appellant.*Willett & Willett*, for respondent.

Root, J.—The appellant, John Russner, is the father of two girls and a boy, aged respectively five, four, and two years. The mother of these children died prior to the commencement of this proceeding. The mother was the daughter of this respondent, Mrs. Frances P. McMillan. Within two months prior to her death, the mother obtained a divorce from appellant, upon the ground that he had not supported her and these children during the three years then last past, although able to do so. The children were awarded to her. When conscious of near approaching death, the mother requested that the children be given to their grandmother and not to their father. After her death, appellant, respondent, and the children resided together for a time, but had difficulty; whereupon appellant withdrew from her home.

At about this time, each of these parties filed a petition for appointment as guardian of the persons and estate of these minor children. The petitions were heard together, and, among other things, the court found: "That the father is in the habit of using liquor freely at all times and places, according to his own will, both at home and abroad; but that he is not an habitual drunkard, and is competent to transact his own business and is fondly attached to his children;" that he has a farm worth \$2,500, a timber claim, and some interests in a mining claim of unknown worth: "that he has no house or home, has no relatives in this country, and no place to which he could take these children; that he would have to place said children with some woman for their care;" that since coming to Seattle, "he has been employed in waiting on tables in one of the basement saloons and restaurants below Yesler way,

in this city (Seattle), working on the night shift, his work being to carry liquor to the tables, and otherwise wait upon the drinkers," card players, and others patronizing that sort of a saloon; "that he is in the habit of drinking liquor while so engaged;" that he had been in the habit of giving these children liquor to drink in moderate quantities with their meals; "that John Russner at the present time is not a fit or proper person to have the care and control of these children and their estate."

We think the findings made by the trial court were certainly as favorable to appellant as he had any right to expect. The evidence showed that his wife had shortly before obtained a divorce because he had failed for three years to support her and these minor children; there was testimony going to show that he had lived for two years with a squaw, he himself admitting that the squaw had stayed at his house during that time as his housekeeper, there being no other woman residing there; he admitted that he had given these young children liquor; and there was evidence that this had been a common practice and carried to such an extent that the little ones, or some of them, had acquired such an appetite that they would cry for these intoxicating drinks. He admitted that he was working nights in an underground saloon south of Yesler way, Seattle, carrying drinks and looking after the card tables for those who congregated there; and that he was a constant drinker himself, and had been drunk some times; and other evidence showed that his getting drunk was a common occurrence.

The trial court denied the appellant's petition for appointment as guardian of the persons and estate of these minors. We think this action was right. The state and the public at large have an interest in the proper nurture, care and education of minor children; and, while it will

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ordinarily be presumed that the parents of minors, on account of natural love and affection, are the ones best calculated to look after their interests, this presumption, like most others, cannot be indulged in the face of facts showing conclusively to the contrary. The natural rights of the father to the care, control, and custody of his minor children cannot, and ought not to, be denied or disturbed in the absence of good and substantial reasons—reasons made imperative by the necessities of such children and the interest in, and the duty owing to, them by the state. But where it has been adjudicated by a court of competent jurisdiction that a father has recently for three years neglected to support his offspring, and has thereby caused his wife to get a divorce, such husband is not in a good attitude to come into court and ask for their custody, control, and guardianship. He should not be allowed the guardianship of his children until, by a substantial period of probation, he is shown to have amended his character and disposition regarding them, and to have acquired those worthy and substantial qualities of heart and mind that characterize the reputable man and the considerate father.

As to the right and propriety of awarding the custody and control and guardianship of minors to others than the father, the authorities afford ample justification. We call attention to a few. In the case of *County of McLean v. Humphreys*, 104 Ill. 378, 383, the court said:

“It is the unquestioned right and imperative duty of every enlightened government in its character of *parens patriae* to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding or misfortune or infirmity, are unable to take care of themselves.”

In the case of *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406, the supreme court of Colorado, among other things, said:

"The old rigid rule of the common law, which gave to the father . . . a right to the custody and services of his child, superior to that of the mother and all others, has in modern times been greatly modified and relaxed both in England and America. Now it is almost universally conceded in both countries that this paternal right must yield and be subordinated to the interest and welfare of the child, under the control of the state."

The foregoing was a case where there was a contest between the father and the immediate relatives of the deceased mother, as to the custody and guardianship of the child, a girl six years of age, of a highly nervous temperament, delicate and devotedly attached to the mother's family, and where the father had no woman member of his household except his mother, aged about eighty years—otherwise without disqualifications of any kind. The court felt that the welfare of the child demanded that it be placed with the mother's relatives—that the consideration for its welfare should predominate over the rights and wishes of the father in the premises. In the case of *Ex parte Crouse*, 4 Whart. (Pa. St.) 9, the court said:

"It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of a strict right the business of education belongs to it. The parents are ordinarily intrusted with it because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance?"

In *Gishwiler v. Dodez*, 4 Ohio St. 615, the court said:

"Neither of the parents has any rights that can be made to conflict with the welfare of the child."

In *Prime v. Foote*, 63 N. H. 52, a child was taken from both father and mother and given to an aunt. Among other things the court said:

"This power of the father, however, is regarded as a

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trust, confided to him by law, upon the presumption that the natural affection of the parent will insure its faithful execution. But, like other guardians, he may, for inability or unfaithfulness, be displaced, and the trust conferred upon another."

With regard to the respondent, the trial court made the following finding: .

"That the grandmother is able and willing to give these children a good home and proper training; that these children are very much attached to her; that they need a good home and the care of some woman who will take their mother's place as far as that is possible; that the grandmother is a strong-minded, sensible, sober, intelligent woman, with whom these children will have the best of care and a good home, with such moral and social surroundings as they should have."

From the evidence, we think this finding is fully as favorable to respondent as could be justified. There were some admitted facts, and considerable evidence in the case, well calculated to arouse a suspicion as to the fitness of respondent to have these minor children. However, the trial court had the benefit of seeing her upon the witness stand, observing her manner and deportment, and the manifestations of love and affection seeming mutually to exist between her and these children, and was in a better position to correctly weigh all of the evidence than are we. The record shows that the learned judge *pro tempore*, who heard this case, tried it with marked fairness and impartiality, keeping paramount a commendably humane consideration for the welfare of these young children. It was an exceedingly delicate matter to deal with. The rights and affections of the father, the love and solicitude of the grandmother, the interest and concern of the state, as to these children—all these were matters to be regarded, and secondary only to the welfare of the children themselves.

In the light of all these considerations, under the evidence and laws of the case, we are disposed not to disturb the judgment of the trial court.

In this judgment and decree, the respondent was granted the temporary guardianship of these minor children, it being specifically adjudged and decreed that they should be and remain wards of the court, and that said order and decree should be subject to modification whenever the best interest of the minors should suggest. In the conclusions of law, among other things, the trial judge stated "that John Russner is not a fit or proper person to have the custody or care of his children *at this time*, but that, under changed conditions, he may hereafter become in law entitled to the custody and care of said minors." It was evidently the intention of the trial judge that, at any time in the future, when the father should furnish to the court proper assurances of suitable reformation in his character and manner of life, in so far as they should bear upon his fitness to have the custody and control of these minors, and should be able to show to the court that their welfare would properly be conserved under his guardianship, that he should be permitted to be appointed as their guardian. The judgment and decree was made temporary in its character evidently for this purpose, and for the further purpose of changing the guardianship from respondent, in case her character and manner of life should become unsuitable to warrant her further holding the custody and control of said children. If the career of this appellant in the future, for such a length of time as to give reasonable assurances of its permanency, is such as to fairly justify him in having the custody and control of these children, his shortcomings of the past should be overlooked, and he should be awarded the guardianship of these children. A

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high standard should not be insisted upon; but it should be sufficiently substantial to assure these children the surroundings, protection, and treatment demanded by ordinary respectability and a wholesome sense of decency.

It is contended that the terms of the judgment and decree called in exercise equity powers of the court, and that such jurisdiction could not be properly invoked in such a proceeding. We think the action of the trial court is abundantly justified by the spirit of our code, and that appellant's contention is at variance with former holdings of this court. *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546. See, also, Bispham, Prin. Equity (6th ed.), § 541 *et seq.*; 2 Story, Equity Juris. (13th ed.). § 1341 *et seq.* The author last cited, § 1342, says:

"The jurisdiction thus asserted, to remove infant children from the custody of their parents and to superintend their education and maintenance, is admitted to be of extreme delicacy, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction which seems indispensable to the sound morals, the good order, and the just protection of a civilized society."

Appellant excepted to the sustaining of objections to questions calculated to show the career of one of respondent's daughters, who, it appears, was once arrested for vagrancy. But it affirmatively appears that this daughter had not been reared by respondent, but had been awarded to a former husband at the time of divorce. Neither did it appear whether this daughter was a minor when arrested. There being no showing of any responsibility on respondent's part for the conduct and training of said daughter, we cannot say that the ruling was error.

Other errors are assigned, but we fail to find merit in these assignments. The judgment is affirmed.

MOUNT, C. J., RUDKIN, DUNBAR, and CROW, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 5387. Decided March 10, 1905.]

A. L. HART, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—INJURY TO PASSENGERS ALIGHTING FROM CAR—DEGREE OF CARE AS TO PLATFORMS—INSTRUCTIONS. In an action for personal injuries sustained by a passenger in alighting from a street car, caused by an alleged defect in the company's platform at a depot, it is not reversible error to instruct that the defendant's duty as a common carrier required the highest degree of care consistent with the reasonable and practical operation of its business, in view of the method and means of conveyance employed, where other instructions were given to the effect that carriers were bound to keep landing places in a reasonably safe condition; the rule being that something higher than merely ordinary care is required as to such places.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 14, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger by reason of a defect in a station platform. Affirmed.

Peters & Powell, for appellant. The high degree of care required of carriers does not apply to grounds, depots, platforms, etc. *Thompson, Carriers*, §§ 104, 309; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74; *Lafflin v. Buffalo etc. R. Co.*, 106 N. Y. 136, 12

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N. E. 599, 60 Am. Rep. 433; *Morris v. New York Cent. etc. R. Co.*, 106 N. Y. 678, 13 N. E. 455, 3 L. R. A. 74; *Christie v. Chicago etc. R. Co.*, 61 Minn. 161, 63 N. W. 482; *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Texas etc. R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846.

Averill Beavers and *James A. Snoddy*, for respondent, cited: *Gaynor v. Old Colony etc. R. Co.*, 100 Mass. 208; *Dodge v. Boston etc. Co.*, 148 Mass. 207, 19 N. E. 373, 12 Am. St. 541, 2 L. R. A. 83; *Wallace v. Wilmington etc. R. Co.*, 8 Houst. (Del.) 529, 18 Atl. 818; *Bethmann v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. 587; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; *Jordan v. New York etc. R. Co.*, 165 Mass. 346, 43 N. E. 111, 52 Am. St. 522, 32 L. R. A. 101; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Chase v. Jamestown St. R. Co.*, 15 N. Y. Supp. 35; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230; *Knight v. Portland etc. R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 4 S. W. 729, 1 Am. St. 706; *Texas etc. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. 308, 11 L. R. A. 395; *Houston etc. R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *Martin v. St. Louis etc. R. Co.*, 56 S. W. (Tex. Civ. App.) 1011; *Chicago etc. R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578; *Jeffersonville etc. R. Co. v. Riley*, 39 Ind. 568; *McDonald v. Chicago etc. R. Co.*, 26 Iowa 145; *Denver etc. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954; *Gulf etc. R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583.

HADLEY, J.—This is an action for damages for personal injuries received by plaintiff upon the station platform of defendant company at Hillman City. The defendant owns and operates an electric railway between Seattle and Ren-

ton, and the plaintiff was a passenger upon one of its cars. When the car stopped at Hillman City, the plaintiff was in the act of stepping from the car to the station platform when it is alleged that it was dark. It is also alleged that, directly beneath the step of the car, a piece of wood, about two inches thick and four inches wide, was nailed along the station platform, and projected above the level thereof; that the strip ran at right angles to the longitudinal direction of the car and track, extending outward from the track the full width of the platform; that the plaintiff stepped upon the edge of this projection, when his ankle turned, causing him to fall, whereby he received severe injuries in the ankle and in both legs. The answer does not deny the condition of the platform, but avers that the defendant had no knowledge thereof, and also pleads contributory negligence. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of \$1,000. The defendant moved for a new trial, and the court required the plaintiff to elect to accept a remittance of \$500 from the amount of the verdict, or submit to a new trial. The plaintiff so elected, and judgment was thereupon entered in his favor for \$500. The defendant has appealed.

There is but one assignment of error. It is urged that the court erred in giving the following instruction:

"You are instructed that the degree of care to be exercised by a common carrier of passengers for hire is the highest degree of care that is consistent with the reasonable and practical operation of its business, in view of the method and means of conveyance employed."

Appellant's argument is that the high degree of care required of carriers of passengers applies only to those means for safety which the passenger must of necessity trust wholly to the carrier, and that the rule does not apply to

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grounds, depots, and platforms. It must be conceded, however, that at least reasonable care is required as to the condition of depots and platforms. The criticized instruction does not say that the highest possible degree of care is required, but only the highest "that is consistent with the reasonable and practical operation of its business, in view of the method and means of conveyance employed." Moreover, the following further instruction was given:

"You are instructed that it is the duty of a carrier of passengers to provide and keep the landing places and platforms used by it for discharging passengers from its vehicles, and all passage ways leading to and from such places in a reasonably safe condition for the purposes intended; and for any violation of its duty in this respect which entails injury upon a passenger, without fault on his part, the carrier will be answerable in damages."

The necessity for reasonable care was also repeated in other instructions. We think the instructions as a whole made it clear to the jury that it was the trial court's view that not the highest possible degree, but a reasonable degree, of care was required. That at least such was required of appellant in the care of its station platform is sustained by the following: *Bethmann v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. 587; *Jordan v. New York etc. R. Co.*, 165 Mass. 346, 43 N. E. 111; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741; *Wallace v. Wilmington etc. R. Co.*, 8 Houston (Del.) 529, 18 Atl. 818; *Knight v. Portland etc. R. Co.*, 56 Me. 234; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713. An examination of the above authorities discloses that most of them recognize that the necessary degree of care, under such circumstances, is higher than merely ordinary and reasonable care. We think the instructions in the case at bar were at least within, and that they certainly did not go beyond, well recognized rules.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5099. Decided March 10, 1905.]

THE STATE OF WASHINGTON *on the Relation of W. C. Griffith, Appellant, v. A. S. NEWLAND, Respondent.*¹

COUNTY OFFICERS—HIGHWAYS—ROAD SUPERVISORS—APPOINTMENT BY COUNTY COMMISSIONERS—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE AUTHORITY. Road supervisors, with duties defined by, and compensation and time of service fixed by the county commissioners, who have the general supervision over roads, are mere employees or deputies of the commissioners, and not county officers within Const., art. 11, § 5, requiring the legislature to provide for their election, and Laws 1903, p. 223, §§ 12, 13, authorizing the commissioners to appoint such supervisors, is not an unlawful delegation of legislative authority or in conflict with said provision of the constitution.

SAME—CLASS LEGISLATION—SPECIAL PRIVILEGES. Laws 1903, p. 223, providing that the county commissioners may appoint the road supervisors from among the qualified electors of the state, is not unconstitutional as granting special privileges or immunities to any citizen or class of citizens in violation of Const., art. 1, § 12, since the law places upon the same terms all persons in the designated class.

SAME—STATUTES—TITLE OF ACT—CONFLICT IN LAWS. The title to the act providing for the levy of road and poll taxes, and for road districts and the appointment of supervisors thereof (Laws 1903, p. 223), being sufficient to authorize such appointments, an objection that it is insufficient to embrace the repeal of former laws providing for the election of supervisors, is immaterial upon the question of the validity of an appointment, since the appointment could be made if the former law was not repealed.

Appeal from a judgment of the superior court for Adams county, Neal, J., entered February 3, 1904, dismissing a

¹Reported in 79 Pac. 983.

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proceeding in *quo warranto*, upon sustaining a demurrer to the petition. Affirmed.

Zent, Lovell & Linn, for appellant, contended, among other things, that the road supervisors are officers, within the provision of Const., art. 11, § 5. 23 Am. & Eng. Ency. Law (2d ed.), pp. 322, 324; *United States v. Maurice*, 2 Brock. 96; *State v. Wilson*, 29 Ohio St. 347; *Vaughn v. English*, 8 Cal. 39; *People ex rel. Ahern v. Bollam*, 182 Ill. 528, 54 N. E. 1032; *United States v. Hartwell*, 6 Wall. 385; *People ex rel. Throop v. Langdon*, 40 Mich. 673; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 55 Am. St. 357, 32 L. R. A. 253; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Patton v. Board of Health*, 127 Cal. 388, 59 Pac. 702, 78 Am. St. 66.

C. L. Holcomb, for respondent.

MOUNT, C. J.—Appellant brought this action in *quo warranto*, denying the right of respondent to perform the duties of road supervisor under the act of March 16, 1903 (Laws 1903, p. 223). The lower court sustained a demurrer to the petition, and entered a judgment of dismissal. Petitioner appeals.

The only questions presented relate to the constitutionality of the act above named. Appellant claims that the act is unconstitutional upon four grounds, as follows: (1) It is a delegation of legislative authority to the various boards of county commissioners; (2) it creates an office and provides for the appointment, and not for the election of such officer; (3) it grants special privileges, and is in conflict with § 12, art. 1, of the constitution; (4) the subject of the act is not expressed in the title. Sections 12 and 13 of the act in question are as follows:

“§ 12. The boards of county commissioners may appoint from among the qualified electors in each district,

for such time as they may determine, with compensation not to exceed \$4 per day, a road supervisor who shall enter into a bond satisfactory to the commissioners. The commissioners shall have power to remove any supervisor at will.

"§ 13. It shall be the duty of the road supervisor, under the direction of the county commissioners, to keep the roads and bridges in his district in as good repair as the funds available will allow, and keep all roads open for travel at all times, and make a detailed monthly report of all work performed in his district during the previous month to the board of county commissioners; examine and certify all bills for labor and material in his district; and perform such other duties as may be required by the commissioners for the proper maintenance of the highways." Laws 1903, p. 225.

The first two objections to the act are based upon the provisions of § 5, art. 11, of the state constitution, which is as follows:

"The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township, or precinct and district officers as public convenience may require and shall prescribe their duties and fix their term of office. It shall regulate the compensation of all such officers . . ."

It is argued that section 12 above quoted creates a county or district officer within the meaning of the constitution, and provides for his appointment instead of his election, and is, for that reason, in violation of the provisions of section 5, of article 11, of the constitution. It is also contended that the act permits the county commissioners to fix the term and compensation of such officers, and that, in these respects, it is an unlawful delegation of the legislative powers to the boards of county commissioners. Both

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questions thus presented are based upon the assumption that the road supervisors provided for in the act are county or district officers, within the meaning of the constitution. It will be noticed that these officers are not independent officers. All their defined duties are under the control and direction of the county commissioners. No terms are fixed. They are appointed for such time as the commissioners may determine, and may be removed at will. Their pay is fixed at the will of the commissioners, at not to exceed \$4 per day, and it is not made compulsory upon the commissioners to appoint such officers; it *may* be done. These restrictions do not usually surround an independent district or county officer, but are such as indicate the subordinate or deputy. When we consider that "the boards of county commissioners of the several counties in the state shall have general supervision over the roads in their respective counties" (Pierce's Code, § 7873), and that "each county commissioner shall be *ex officio* road commissioner of the several road districts in his commissioner district and shall see that all of the orders of the board of county commissioners pertaining to roads in his district are properly executed" (Pierce's Code, § 7870), it is readily understood that the road supervisors provided for in the act are mere employees or deputies of the county commissioners, with limited powers and duties, and not county or district officers within the meaning of the constitutional provision named.

This court, in *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974, had under consideration the construction of this constitutional provision, and at page 441, said:

"The question is, what is meant by the term 'officer' as used in the section of the constitution under consideration? And it seems to us that the answer is suggested by a consideration of the section, and what it calls upon the legis-

lature to do. It requires the legislature to provide, first, by general and uniform laws for the election of county officers (not deputies or assistants); second, to prescribe their duties; third, to fix their terms of office; and, lastly, to regulate the compensation of 'such officers.' The whole scope of the provision relates to the 'officer,' and to him alone. It is for *his* election that provision is to be made by the legislature; it is *his* term of office that is to be fixed and it is equally true that it is only *his* compensation that the legislature is required to regulate; and, if we are right in this construction, then it necessarily follows that as to needful deputies and assistants the section imposes no legislative restrictions or limitations, and the legislature is left in precisely the same condition, and with the same power and authority, as concerns the subject of this litigation, viz., the deputy county clerk of Clallam county, that it would have been in had § 5, of art. 11, never been incorporated in the constitution."

This case, we think, is directly in point upon the first two objections presented by appellant, and is decisive of them.

Appellant next contends that, if the road supervisors provided for are not county or district officers, and if their appointment is held to be an employment, then the act is void because it provides for employment from among the qualified electors, and is in conflict with the provisions of § 12, of art. 1, of the constitution, which provides that "no law shall be passed granting to any citizen or class of citizens . . . privileges or immunities which, upon the same terms shall not equally belong to all citizens." But this court has uniformly declared that this provision of the constitution does not apply to a law which places "*upon the same terms*" all persons coming within a certain designated class. All the electors in the district certainly and clearly are upon the same terms, and are eligible to the employment. There is no class discrimination here.

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Opinion Per MOUNT, C. J.

It is next contended that the title of the act is insufficient. The title is as follows:

"An act providing for the levy, collection and manner of payment of road, bridge, poll and property taxes, and the manner of the expenditure thereof, and providing for the division of counties into road districts and the appointment of supervisors thereof, and repealing all acts and parts of acts in conflict herewith."

Appellant does not claim that this title is insufficient to support the sections of the act authorizing the appointment of the respondent to the office or employment which he exercised, but the argument made is that this act by its terms repeals former acts inconsistent with it and thereby abolishes the old system of election district road supervisors. We think the title is sufficient. But, in any event, this argument is not pertinent in this case because, even if the supervisors under the old system may still be elected, that result cannot affect the right of one appointed under this act to hold his office or employment, when the title of the new act is sufficient to authorize the appointment. The constitutional objections made to the act in question do not appear to be well taken.

The judgment of the lower court is therefore affirmed.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5306. Decided March 10, 1905.]

DORA TWIGG, *Respondent*, v. FANNIE JAMES *et al.*,
Appellants.¹

MORTGAGES—FORECLOSURE—JUDGMENT—JURISDICTION TO GRANT RELIEF PRAYED—DEFAULT. A judgment in foreclosure cannot be objected to for want of jurisdiction to grant the relief on the ground that the mortgage secured only one of the notes for which the judgment was entered, where the complaint alleged that it secured both notes and the defendants defaulted.

JUDGMENT—VACATION—PROOF OF SERVICE—RECORD FAILING TO SHOW—IRREGULARITY—DEFAULT. Failure of the record to show proof of service of the summons is merely an irregularity that does not affect the jurisdiction of the court to render judgment, where the court has found that default was duly entered.

JUDGMENT—VACATION—FRAUD—FAILURE TO ACCEPT OFFER OF COMPROMISE. A judgment of foreclosure entered upon default duly taken will not be set aside on the ground of fraud, in that plaintiff's counsel failed to submit to his client a proposition of settlement made by the defendants as he agreed to do, where it is not shown that defendants were misled by any false statement.

JUDGMENT—VACATION—NO MERITORIOUS DEFENSE—FORECLOSURE DECREE FOR SUM NOT SECURED—SALE FOR LESS SUM. Where a judgment of foreclosure was entered for the amount of two notes, only one of which was secured by the mortgage, and at the sale the premises were bid in for less than the amount of such note, a deficiency judgment for the balance is not subject to attack where it is not disputed that the indebtedness upon the other note was valid, due, and unpaid.

JUDGMENT—VACATION—TIME AND METHOD OF FILING APPLICATION. Under Bal. Code, §§ 5153, 5156-7, an application to vacate a judgment for fraud in obtaining it must be made by petition within one year, by the notice prescribed, or by bill in equity, and cannot be made by special appearance in the action five years after entry of the judgment.

Appeal from orders of the superior court for King county, Bell, J., entered March 18, and April 18, 1904, refusing to vacate a foreclosure decree and deficiency judg-

¹Reported in 79 Pac. 959.

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Opinion Per HADLEY, J.

ment entered June 8, 1899, upon the special appearance and motions of the defendants. Affirmed.

H. E. Peck, for appellants.

Fred H. Peterson, for respondent.

HADLEY, J.—This appeal is from an order denying a motion to vacate a judgment. The judgment was entered June 8, 1899. The motion to vacate, made upon special appearance of the judgment defendants, was filed February 10, 1904. The judgment sought to be vacated was for the recovery of money upon two promissory notes of the defendants, and also contained a decree foreclosing a mortgage, ordering real estate sold to satisfy the judgment and awarding a deficiency judgment. The motion to vacate is based upon the following alleged grounds: (1) That the court had no jurisdiction to grant the relief contained in the decree; (2) that the judgment was void in that it was rendered by default without proof of service of the summons and complaint; (3) that it was procured by fraud.

We think the judgment was not void for want of jurisdiction. The complaint contained two causes of action upon two distinct promissory notes, and alleged that the notes were secured by mortgage. The court found that the default of the defendants had been duly entered. This presupposed due service of the summons and complaint. This is not denied by anything in the record, and we do not understand that it is in fact disputed. It is also shown that the mortgaged land is in King county. It follows that the court had jurisdiction of the persons of the appellants, and of the subject matter; also, to enter personal judgment, and to decree foreclosure of the mortgage. It is said that the mortgage in fact secured but one of the notes, but the complaint alleged otherwise and demanded

foreclosure of the mortgage for the whole amount. The allegations of the complaint supported the judgment. Appellants had notice of such allegations, and also of the demand in the complaint.

The point is made that the judgment was void for want of proof of service of the summons and complaint. It is true, such proof does not appear in the statement of facts brought here, but the above-mentioned finding of the court that the default was duly entered meets that objection.

"Although it was irregular not to have proof of service appear of record, this would not affect the jurisdiction of the court to render judgment." *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724.

It is contended that the judgment was void because procured by fraud. Speaking now without regard to the matter of procedure, and only upon the merits of the contention as to fraud, it is merely claimed that, after suit was brought, one of the appellants proposed to respondent's counsel that appellants would convey the property in satisfaction of the mortgage debt; that the counsel said he would consult with his client, and let appellants know if she would accept the offer; but that he did not communicate with appellants afterwards, before judgment was taken, which provided for a deficiency. That such a conversation occurred is affirmed by the affidavit of one of the appellants, and is denied by that of the counsel. If the trial court considered the question of alleged fraud upon its merits, its denial of the motion to vacate was equivalent to a finding that appellants had not established their contention, and, under the evidence in the record, we should not be disposed to disturb such finding.

Assuming that the alleged conversation did occur, the appellants were, in any event, advised by the complaint

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that judgment was demanded for the full amount of both notes, and, also, for a foreclosure as to the amount of both. The conversation amounted to no more than a mere offer which was not accepted, and, inasmuch as appellants already knew the extent and nature of the demand of the suit, they cannot claim fraud for a mere failure to accept a compromise offer, since it is not shown that they were misled by any false statements or representations. Respondent was entitled to a deficiency judgment on the pleadings. It was so held as to this very judgment in *State ex rel. Twigg v. Superior Court*, 34 Wash. 643, 76 Pac. 282.

Under any view of the case, she was entitled to foreclosure and a deficiency judgment as to the note which it is admitted was secured by the mortgage. It is shown here that the land was afterwards sold, under the foreclosure execution, for less than the amount of the judgment based upon that note alone. It is not disputed that the indebtedness upon the other note was valid, due and unpaid. Respondent was, therefore, entitled to a personal judgment for the amount thereof, and, inasmuch as it stands as a mere personal judgment for an unpaid debt, we are unable to see that appellants are in any way harmed. If the judgment had been taken in another action, it would have been as much a lien as it now is.

Furthermore, even if we deemed appellants' contention meritorious, it has neither been timely presented nor in the proper way. Under our statute, Bal. Code, §§ 5153, 5156 and 5157, an application to vacate a judgment on the ground of fraud in obtaining it must be by petition, commenced within one year after the judgment was made, and on the same notice as to time, mode of service, and return, as in ordinary actions. This proceeding was begun by a mere motion, on special appearance, without the necessary

notice and nearly five years after the rendition of the judgment. It was held in *State ex rel. Boyle v. Superior Court, supra*, that the court has no authority to vacate a judgment years after its rendition, upon mere motion such as was made here. It was pointed out that a bill in equity might lie to set aside the judgment, but that, in such case, the party in interest would have to be legally brought in by service of process.

For the reasons above stated, the judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5290. Decided March 10, 1905.]

JOHN MILLETT, *Appellant*, v. THE PUGET SOUND IRON
AND STEEL WORKS, *Respondent*.¹

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT—INJURY TO EMPLOYEE ENGAGED IN PAINTING ENGINE BY ACT OF TESTER PUTTING THE SAME IN MOTION. Where two employees of the defendant were engaged in painting an engine just completed in defendant's shops, and ceased work to enable another employee to test the engine, and after a short time one of the painters informed the other that the testing was completed and they could return to work, whereupon he proceeded to do so, but the engine tester returned and put the engine in motion thereby injuring the painter's foot in the machinery, the men are fellow servants engaged in a common employment, and the master is not liable.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 6, 1904, upon a verdict rendered in favor of the defendant by direction of the court, after a trial on the merits, dismissing an action for personal injuries sustained by an employee by

¹Reported in 79 Pac. 980.

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Citations of Counsel.

reason of the starting of an engine which he was engaged in painting. Affirmed.

Govnor Teats and *A. H. Garretson*, for appellant, contended, among other things, that when Millett was ordered to go upon the engine to finish the painting he had a right to assume that he was going to a place of safety. *Green v. Western Am. Co.*, 30 Wash. 87, 70 Pac. 310; *Czarecki v. Seattle etc. Nav. Co.*, 30 Wash. 288, 70 Pac. 750; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Norton Brothers v. Nadebok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842; *Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Taylor v. Evansville etc. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. 372, 6 L. R. A. 584. Scholl, the tester, in control of dangerous machinery, was a vice principal. *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *Bailey v. Cascade Timber Co.*, 32 Wash. 319, 73 Pac. 385; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70, 74 Pac. 1064.

Hudson & Holt, for respondent. No duty of superintendence of the details of the work is imposed on the master. 2 Labatt, §§ 586, 587, 588; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. 787, 3 L. R. A. 559; *Besel v. New York etc. R. Co.*, 70 N. Y. 171; *The Queen*, 40 Fed. 694; *Kimmer v. Weber*, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. 630. The failure to give warning of the starting of the engine could not be anticipated or provided against by the master. *Capasso v. Woolfolk*, 163 N. Y. 251, 57 N. E. 1021; *Perry v. Rogers*, 157 N.

Y. 251, 51 N. E. 1021; *Vitto v. Farley*, 36 N. Y. Supp. 1105. It is not the duty of the master to give warning of the dangers that may arise in the execution of the details of the work, and he does not guarantee that a place will remain safe during the progress of the work. *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969; *McGowan v. Chicago etc. R. Co.*, 91 Wis. 147, 64 N. W. 891; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Minneapolis v. Lundin*, 58 Fed. 525; *Bergstrom v. Staples*, 82 Mich. 654, 46 N. W. 1035; *Porter v. Silver Creek etc. Coal Co.*, 84 Wis. 418, 54 N. W. 1019; *Quigley v. Levering*, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62. Under the circumstances of this case it was not the duty of the master to give warning. *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327; *Fournier v. Columbian Mfg. Co.*, 70 N. H. 629, 44 Atl. 104; *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324; *Henshaw v. Pond's Extract Co.*, 21 N. Y. Supp. 177; *Whitley v. Block*, 95 Ga. 15, 21 S. E. 985; *Davis v. Muscogee Mfg. Co.*, 106 Ga. 126, 32 S. E. 30; *Wellihan v. National Wheel Co.*, 128 Mich. 1, 87 N. W. 75; *Schroeder v. Flint etc. R. Co.*, 103 Mich. 213, 61 N. W. 663, 50 Am. St. 354, 29 L. R. A. 321. It is not the duty of the master to protect or warn against dangers which are transitory. *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; *Whittaker v. Brent*, 167 Mass. 588, 46 N. E. 121; 2 Labatt, §§ 587, 588. The danger that Scholl might turn on the steam at an improper time, was one of the risks assumed by appellant of which the master is not required to warn. *Wilson v. Northern Pac. R. Co.*, *supra*; *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, 771; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Taylor v. Evansville etc. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. 372, 6 L. R. A. 584; *Bailey*, Personal Injuries,

p. 2993; *Anderson v. Oregon R. & Nav. Co.*, 28 Wash. 467, 68 Pac. 863; *Hawk v. McLeod Lumber Co.*, 166 Mo. 121, 65 S. W. 1022. There is a distinction between construction work and work in handling machinery after it has been placed in operation. *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114; *Murphy v. Boston etc. R. Co.*, 88 N. Y. 146, 42 Am. Rep. 240; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *Meeker v. Remington etc. Co.*, 65 N. Y. Supp. 1116; *Fraser v. Red River Lum. Co.*, 45 Minn. 235, 47 N. W. 785; *Colorado Coal etc. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; 1 Labatt, §§ 29, 268; 2 Labatt, pp. 1375, 1376, § 589. There was nothing in the act of testing akin to the use of the engine; the trial of the engine was one of the last steps in its manufacture and completion. *Murphy v. Boston etc. R. Co.*, *supra*. Under these circumstances, Scholl and appellant were fellow servants engaged in the construction of the engine. *Murphy v. Boston etc. R. Co.*, *Metzler v. McKenzie*, *Armour v. Hahn*, *Meeker v. Remington etc. Co.*, *Fraser v. Red River Lum. Co.*, *Colorado etc. Co. v. Lamb*, *Porter v. Silver Creek etc. Coal Co.*, *supra*; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Sheehan v. Prosser*, 55 Mo. App. 569; *Keith v. Walker Iron etc. Co.*, 81 Ga. 49, 7 S. E. 166, 12 Am. St. 296; *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947; *Fox v. Sandford*, 4 Sneed (Tenn.) 36, 67 Am. Dec. 587; *Daley v. Brown*, 60 N. Y. Supp. 840; *Buckley v. Gould etc. Min. Co.*, 14 Fed. 833; *Wolcott v. Studebaker*, 34 Fed. 8; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; *Chapman v. Reynolds*, 77 Fed. 274; *Mann v. O'Sullivan*, 126 Cal. 61, 58 Pac. 375, 77 Am. St. 149. An assurance of safety given by one servant is not binding on the master unless he is a vice principal by virtue of his rank. 2 Labatt, § 596; *Martin v. Atchinson etc. R. Co.*, 166 U. S. 399, 17 Sup.

Ct. 603; *Balch v. Haas*, 73 Fed. 974; *McGowan v. St. Louis etc. R. Co.*, 61 Mo. 528; *Schott v. Onondaga County Sav. Bank*, 63 N. Y. Supp. 631.

PER CURIAM.—The appellant was injured while in the employ of the respondent, and instituted this action to recover damages therefor, alleging in his complaint that the injury was caused by negligence for which the respondent was liable. The respondent owns and operates machine shops at the city of Tacoma, and, as a part of its business, manufactures logging engines. The appellant was employed as a helper in its shop, his duties being to assist the machinists with their work, and to perform such labor as did not require special skill and training. At the time of the occurrence of the injury for which the appellant sues, the respondent had a number of logging engines nearly completed, and was putting on them the final touches, preparatory to turning them out of the shops. The appellant, with another helper, Charles Hurd, was engaged in painting one of these engines, when another employee, John Scholl, came along and notified them that he was about to test the engine on which they were painting, whereupon the appellant and Hurd quit work at the engine. About forty or forty-five minutes thereafter, Hurd came to the appellant, told him that the tester had finished with the engine on which they were formerly working, and that he might go back and finish the painting. The appellant went to the engine, climbed upon it, and was proceeding with his work, when Scholl came back and put the engine in motion, catching the appellant's foot in the machinery, and crushing it off.

It is the contention of the appellant that both Scholl and Hurd were vice principals as to him, and that the negligence of either of them would be the negligence of the

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Statement of Case.

respondent. But we know of no principle of law on which this contention can be maintained. All three of them were working for a common employer, under a common foreman, in a common enterprise, and in connection with each other. If, under any circumstances, two or more persons working for a common master can be fellow servants, we think they were so in this instance.

Affirmed.

[No. 5477. Decided March 11, 1905.]

VAN R. PIERSON, *Respondent*, v. JOHN PEIRCE,
Appellant.¹

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542 188

APPEAL AND ERROR—DISMISSAL—BONDS—AMOUNT OF SUPERSEDEAS BOND—MONEY JUDGMENT—INTERPLEADER. In an action of interpleader to recover a deposit in a bank, in which the money in controversy was deposited with the clerk of the court and judgment was entered ordering the clerk to pay it to the plaintiff, an appeal bond, conditioned also to effect a supersedeas, in a sum fixed by order of court, but less than double the amount of the judgment, is insufficient to give the supreme court jurisdiction of the appeal, and the appeal must be dismissed (Fullerton, J., dissenting).

Appeal from a judgment of the superior court for King county, Bell, J., entered May 13, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, ordering the payment to the plaintiff of money in court, in an action of interpleader. Appeal dismissed.

Jerold Landon Finch, for appellant.

W. E. Humphrey and *Edward Von Tobel*, for respondent.

¹Reported in 79 Pac. 1003.

RUDKIN, J.—This action was brought, in the first instance, against the defendant the First National Bank of Seattle, to recover the sum of \$2,500, which the bank agreed to pay the plaintiff in this action, upon the happening of a certain contingency, set forth in the amended complaint. The prayer of the complaint was for a judgment for the sum of \$2,500, and costs. The defendant bank thereafter paid said sum of \$2,500 into court, and caused the other defendants, Starbuck and Peirce, to be substituted as defendants in its place. A trial was had, and the court adjudged that the plaintiff was entitled to the \$2,500 paid into court, and directed the clerk of the court to pay said sum over to him. The defendant Peirce appealed from this judgment, and, upon his application, the court fixed the amount of the supersedeas bond in the sum of \$500, and the appellant gave a bond in the sum of \$800, conditioned as both a stay bond and a cost bond, and the respondent now moves to dismiss the appeal, on the ground that the bond is insufficient, and that, by reason thereof, this court has no jurisdiction of the appeal.

The motion must be granted. In numerous cases, commencing with *State ex rel. Washington Bridge Co. v. Superior Court*, reported in 11 Wash. 366, 39 Pac. 644, we have held that the giving of a stay bond in double the amount of a money judgment is jurisdictional on appeal, and this must now be accepted as the settled law in this court. We are unable to distinguish this case from our former decisions. In *State ex rel. Commercial Nat. Bank v. Superior Court*, 14 Wash. 365, 44 Pac. 859, it was held that the requirement that a stay bond shall be given in double the amount of a money judgment is applicable to a party appealing from a mortgage foreclosure, although the appellant is not personally liable for the payment of the mortgage debt. In that case the court said:

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"Respondent contends that the provision as to the giving of a bond in double the amount of the judgment applies only in cases where the appeal is taken by the one who is liable to pay the judgment; but there is nothing in the statute which warrants this contention. It makes no distinction in regard to appeals by different parties affected by the judgment, and the statute having made no such distinction, it is not for the courts to make it. Beside, the effect upon the owner of the judgment would be the same if its execution were stayed in the interest of a party not bound to pay it, as it would if the stay were in the interest of such party."

So, in this case, the clerk of the court was directed to pay the sum of \$2,500 to the respondent. Had the clerk appealed, or attempted to appeal, from this order, we have no doubt that he would have been required to give a bond in double the amount of the judgment, in order to effect a stay of proceedings pending the appeal, and the effect of the appeal by the present appellant has the same effect as would an appeal and stay by the clerk himself. The respondent is deprived of his money pending the appeal, and the fruits of his judgment may be wholly lost through the wrongful acts of the clerk, or from other causes over which he has no control.

The appeal is therefore dismissed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

FULLERTON, J. (dissenting).—The statute provides that an appeal bond, in order to effect a stay of proceedings, where the appeal is from a "final judgment for the recovery of money" shall be in a penalty double the amount of the "damages and costs recovered in such judgment," and, in other cases, in a sum not less than two hundred dollars, and "sufficient to save the respondent harmless

from damages by reason of the appeal, as a judge of the superior court shall prescribe." Bal. Code, § 6506. The contest between the parties in this action was over a fund in court, and the judgment entered simply determines which of them was entitled to the fund. The question then is, is this a judgment for the recovery of money, as that term is used in the statute? I do not think so. The statute, in using this phrase, has in contemplation a judgment for the recovery of money by one party against another which that other is obligated to pay; it has no reference to a judgment which merely determines the rights of the parties to a specific chattel. Suppose, in this case, the chattel in court had been a watch, or some article of personal property other than money, what kind of a bond would the court say should be given? Assuredly one "sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall prescribe." This is the only bond that could be given; there could be none in double the amount of the recovery. Why should the rule be different merely because the fund in court is money? This question the opinion of the majority does not answer.

The case of *State ex rel. Commercial Nat. Bank v. Superior Court*, 14 Wash. 365, 44 Pac. 859, when read in connection with its facts, I do not think supports the rule announced here. But whether it does or not, makes but little difference. The case itself is a plain perversion of the statute. It holds that a defendant, claiming a specific tract of real property, cannot appeal from a judgment holding such property to be included in a mortgage, and stay the sale of the property claimed pending the appeal, without giving a bond to pay the mortgage debt; and this, notwithstanding he is not otherwise obligated to pay the debt, and notwithstanding the property claimed may be

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worth but \$100, while the mortgage debt may be \$100,000. If the statute means this, it is, in my judgment, unconstitutional as an unwarranted restriction on the right of appeal.

But it is said that the clerk was directed to pay this money over, and, had he appealed from the judgment, he would have been required to give a bond in double the amount of the judgment, and it is reasoned from this that the appellant should have given such a bond. But, unfortunately for the simile, the clerk could not appeal from this judgment. The fund is in the clerk's hands because he is the officer of the court whose duty it is to keep such funds. The fund is, nevertheless, in court, and the clerk could no more appeal from a judgment determining which of two claimants is entitled to it than could the bailiff of the court, the sheriff, or the judge who presided when the judgment was rendered; the clerk is but one of the constituent parts of the court, and cannot be heard to question, anywhere, the validity of the orders of the court of which he is clerk, made in cases in which he is not a litigant. What, therefore, would be his obligations, had he the right of appeal, cannot be held to measure the rights of the appellant.

Nor is the fact that the fund may be lost, pending the appeal, by the wrongful acts of the clerk, any reason for holding that the appellant should give a bond in double the amount of the money on deposit. It is not the policy of the law to require a litigant to guarantee the faithful performance of duties by public officers, as a condition precedent to his right to appeal to the courts. The law requires the clerk himself to give security that he will faithfully perform his duties, and it is to this security that a person, injured by his wrongful acts, should be compelled to look for redress. It should not be held that

an appeal bond is intended as such security, unless the statute regulating appeals positively requires such a construction, and ours does not. In my opinion, the motion to dismiss the appeal should be overruled, and the case heard on its merits.

[No. 5326. Decided March 11, 1905.]

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BEN F. HAMLIN *et al.*, *Respondents*, v. COLUMBIA & PUGET
SOUND RAILROAD COMPANY, *Appellant*.¹

RAILROADS—DEATH OF PEDESTRIAN ON RIGHT OF WAY—TRESPASSER OR LICENSEE—EVIDENCE—SUFFICIENCY—NONSUIT. A pedestrian on a railroad right of way is a trespasser, to whom the company owes no duty as a licensee, in the absence of wilful or wanton neglect, where it appears that she and her family and a few villagers were in the habit of walking upon the track to a post office three-fourths of a mile from her home, that notices were posted along the right of way warning trespassers of the danger of walking thereon, and that there was a public road that might have been taken almost parallel to the railroad, no express license to use the track having been given.

SAME — PEDESTRIAN'S DEAFNESS — CONTRIBUTORY NEGLIGENCE. Where a person is very deaf, she is guilty of gross negligence in walking upon a railroad right of way without keeping a constant lookout for a daily train that had been in the habit of passing her home for years.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 18, 1904, upon the verdict of a jury rendered in favor of the plaintiffs in an action for causing the death of a pedestrian upon a railroad right of way. Reversed.

Piles, Donworth & Howe and *C. H. Farrell* (*Dallas V. Halverstadt*, of counsel), for appellant.

F. E. Knowles and *Frank H. Knapp*, for respondents.

¹Reported in 79 Pac. 991.

RUDKIN, J.—For a number of years prior to the 14th day of March, 1903, the defendant, Columbia & Puget Sound Railroad Company, operated a railroad through the village of Cedar Mountain in King county. On the above date, and for some few years prior thereto, Cedar Mountain was a deserted mining camp. The entire population of the place consisted of a few families. The railroad in question was principally used as a logging and coal road. As the railroad approaches Cedar Mountain, in the direction of Seattle, it rounds a curve in close proximity to Cedar Mountain, and passes through a cut within a few hundred feet of the post office at the latter place. On the morning of the above date an engine, drawing four cars, backed up the railroad toward Cedar Mountain, at a velocity of about fifteen or sixteen miles per hour, as had been the custom every day for a period of about five years.

Mrs. Hamlin, wife of the plaintiff J. D. Hamlin, and the mother of the other plaintiffs, together with her family, had lived about three-fourths of a mile from Cedar Mountain, in the direction of Seattle, on the line of said railroad, for a period of about four years prior to March 14, 1903. On the morning of that day, she started from her home to the post office, at Cedar Mountain, and, as she reached a point on the railroad track a short distance from the post office, she was struck by the above train, and instantly killed. None of the train crew saw or observed the deceased on the track before the accident. There was but one eye-witness to the accident, and he testified on the part of the plaintiffs. This witness saw the deceased coming along the railroad track in the direction of Cedar Mountain, and the next instant saw the train approaching from the same direction, behind the deceased. She was struck by the train and killed as above stated.

This witness was from five hundred to one thousand feet further from the train than the deceased, and both saw and heard the train before it struck her. There was nothing to prevent the deceased from seeing the approaching train for a distance of three hundred feet before it struck her, had she looked. The deceased was forty-nine years of age at the time of her death, and was quite deaf.

There was a public road leading from the home of the deceased to Cedar Mountain, almost parallel with the railroad track. The deceased, her husband, and children, and the few villagers and school children resident in and about Cedar Mountain, had been in the habit of using the railroad track as a footpath, in going to, and returning from, Cedar Mountain, for a number of years prior to the accident. It is not claimed that any of these parties had an express license to use the railroad track as a footpath, nor is it claimed that they had ever been forbidden to use it by any officer or agent of the defendant company. There were signs on the right of way, on either side of Cedar Mountain, and at different places along the track, warning the public not to walk upon the track, and cautioning them against danger. Some of the witnesses for the plaintiffs claimed that these signs were only placed at crossings, and that the warning only applied to such places. This action was brought to recover damages for the wrongful act of the defendant in causing the death of the deceased. The plaintiffs had judgment below, and defendant appealed therefrom.

The principal question discussed on this appeal is, was the deceased a licensee upon the track, or was she a trespasser there, at the time she met her death? We think this case is controlled by *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506, 79 Pac. 32. The extent of the use of the

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track by foot-passengers in that case is thus stated in the opinion of the court:

"The track, when not obstructed with cars, furnished a convenient way for those desiring to pass to and from First Avenue South to the water front, and was extensively used for that purpose, particularly by the employees of several large manufacturing plants situated on the water front. The respondents, although they seem not to have forbidden the use of the trestle by pedestrians, did not invite or encourage travel over it by the manner of its construction. It was made unusually narrow—so narrow, in fact, that when cars were standing upon it, there was but a very small space beside the cars and the ends of the ties along which a footman could pass, and this was made more difficult of passage by the occasional insertion of short ties, which left gaps in the way from three to five feet wide, which had to be crossed. Because of its peculiar construction it was known locally as the 'slim track.' No planks were laid upon it, either between the rails or elsewhere, over which a person could walk, and, while it was shown that it was freely used as a passageway when clear, it appeared that it was very seldom that any one crossed over it when cars were standing upon it. Neither of the respondent companies had forbidden in any public manner the use of the track as a passageway, nor did they maintain lookouts or guards to warn pedestrians of the times it was going to be put into use by themselves."

In answer to the contention that such use amounted to a license, the court said:

"But it is not to be inferred from slight circumstances that a railway company has granted to the public a joint use of its track between given points. The track is constructed primarily for the purpose of carrying passengers and freight in cars, and its use as a footpath is secondary always. To permit its use as a footpath greatly increases the danger to those traveling in cars, and it is not the policy of the law to encourage such use, and, unless a

clear right to be upon the track at the given place is shown, a footman thereon is to be regarded as a trespasser. In certain instances, of course, a joint use must be reserved to the public; for example, the public must have the right to cross at fixed places, and it is usually held that a public crossing has been acquired by user on much less evidence than is required to establish a public way along the track; the one being in nearly every instance a necessity, while the other is usually only a mere matter of convenience. Indeed, in some of the states it seems to be held that a right of way along the track cannot be acquired by user merely, unless it be at the station or depot grounds or in the yards, where the public naturally resort [citing cases]. But, if the rule be otherwise in this state, as to the right to acquire a joint right along the track, such right is only acquired by use so definite and long existing as to clearly impute acquiescence on the part of the railroad company in such use. The very slight use made of the trestle in question here by pedestrians, when cars were standing upon it, cannot be held to confer such a joint right. We conclude, therefore, that the appellant, at the time of his injury, was a trespasser, and that the defendants could be held liable for such injury only in case their conduct was so grossly negligent as to amount to wantonness."

If a court should permit a jury to find that such use as was shown in this case amounts to a license, the necessary effect will be to impress every foot of railroad throughout the settled portions of the country with a license in favor of foot passengers. It is a matter of common knowledge that all railroads are used to a greater or less extent by foot passengers, unless such passengers are absolutely excluded therefrom by barriers or by force. In this case the company had notices posted along its right of way warning trespassers of the danger of walking on the track, and the track itself was a continuing notice and warning

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against such danger. The hearing of the deceased was so far impaired that she was compelled to use an ear trumpet in ordinary conversation. When such a person walks along a railroad track, without a continual exercise of vigilance for approaching trains, she takes her life in her hand and invites disaster. The deceased was, therefore, a trespasser on the right of way, and was guilty of gross negligence which contributed directly to her injury and death. There can be no serious claim of wilful or wanton negligence on the part of the appellant, and there is, therefore, no liability for the unfortunate accident complained of.

The judgment is reversed, with directions to dismiss the action.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 5255. Decided March 11, 1905.]

WILLIAM COLLINS, *Plaintiff*, v. GEORGE KINNEAR *et al.*,
Respondents, and DELIA M. HOTCHKIN, *Appellant*.¹

JUDGMENT—VACATION—PARTIES—SUBSTITUTION BY STIPULATION. Upon a petition to vacate a judgment, a stipulation providing that certain named persons are to be considered as the real parties in interest instead of specified parties to the judgment, amounts to an agreed substitution.

APPEAL AND ERROR—PARTIES—NOTICE—DENIAL OF VACATION OF JUDGMENT. Upon an appeal from an order denying a petition to vacate a judgment, the notice of appeal need be served only upon the parties who appeared in that proceeding to contest the petition.

¹Reported in 79 Pac. 995.

APPEAL AND ERROR—NOTICE—TIME OF FILING—SERVICE ON UNNECESSARY PARTIES. The requirement of Bal. Code, § 6503, that notice of appeal be filed within five days after service, is jurisdictional, and where the effective service upon all who were necessary parties was made in March, and the filing was not made until June, the appeal must be dismissed, and it is immaterial that a service of the notice was made upon non-essential parties in June within five days of the filing.

Appeal from a judgment of the superior court for King county, Hatch, J., entered March 9, 1904, dismissing a petition to vacate a judgment, upon sustaining a demurrer thereto. Appeal dismissed.

James M. Epler and James E. Morrison, for appellant.

Ballinger, Ronald & Battle, and *George E. De Steiguer*, for respondents.

HADLEY, J.—This is an appeal from a denial of a petition to vacate a judgment. The judgment was rendered in the superior court, on appeal thereto from the board of state land commissioners. The proceeding involved the right to purchase certain tide lands, for which there were a number of applicants. By the terms of the judgment in the superior court, the right to purchase was awarded to George Kinnear, W. R. Brawley, D. C. Brawley, and McNaught-Collins Improvement Company, intervenor. Delia M. Hotchkin, who was not a party to said proceedings, either before the board of land commissioners or in the superior court, petitioned for the vacation of the judgment. The petition in form complied with the statute, and was duly verified. In response to the summons or notice issued thereon, the McNaught-Collins Improvement Company, one of the beneficiaries under the original judgment, appeared. The other beneficiaries, George Kinnear, W. R. Brawley and D. C. Brawley, did not themselves ap-

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pear; but a written stipulation, signed by counsel for the respective parties, was filed, and it contained the following:

"That in all matters herein relating to the petition of Delia M. Hotchkin to vacate the judgment heretofore rendered in this proceeding, the said C. B. Bussell and E. V. Bussell are to be considered as the real parties in interest instead of the respondents George Kinnear and W. R. and D. C. Brawley."

The above amounted to an agreed substitution of the two Bussells, as the real parties in interest, instead of George Kinnear and the two Brawleys. The Bussells appeared to the petition. The said appearing parties, McNaught-Collins Improvement Company and the two Bussells, demurred to the petition, on the ground that it does not state facts sufficient to entitle the petitioner to have the judgment vacated. No other parties appeared. The demurrers were sustained, and judgment was entered dismissing the petition. The petitioner has appealed.

Respondents moved to dismiss the appeal. Other grounds are urged, but we shall confine our discussion to the contention that appellant did not, within five days after the service of the notice of appeal, file with the clerk of the superior court either the original or a copy of such notice, with proof or written admission of service thereof. It appears that the notice of appeal was served upon a number who were parties in the original action, but who did not appear to the petition to vacate the judgment. The only parties who appeared to the petition were those who prevailed in the original judgment. This appearance, as we have seen, was made by one in its own behalf, and by the others through agreed substituted parties.

The notice of appeal was served upon those who ap-

peared to the petition on March 31, 1904. But the notice, with the proof of its service, was not filed in the clerk's office until June 22, 1904. Service of the notice was made upon others who were parties to the original action at the same time it was made upon those who appeared to the petition. Subsequently, on the 17th of June, service was made upon two others who were parties in the original action, but who did not appear to the petition. Five days after the last named service, the notice of appeal, with proof of its service upon the respective parties and upon the respective dates aforesaid, was filed.

Appellant argues that it is often a physical impossibility to serve all parties with notice of appeal upon the same day, and that the five-day period must begin to run from the date of the last service which constitutes the completed service, provided it is made within the statutory time for taking the appeal. Whatever force there may be in appellant's argument, when applied to a case where the parties served upon different dates are necessary parties to the appeal, still we think it does not apply to the conditions of this appeal. Under the terms of Bal. Code, § 6504, it is not required that the notice of appeal shall be served upon any except those "who have appeared in the action or proceeding." Manifestly this means those who have appeared in the proceeding wherein the judgment is rendered and from which the appeal was taken, which in this case was the proceeding to vacate the judgment. Service upon others can effect no vital purpose, and amounts to a mere nullity. Such was therefore true of the last service in this case. It follows that the only effective service was made when the parties who appeared and defended against the petition were served on March 31. The notice, with proof of its service, was not filed until

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eighty-two days after that time. Bal. Code, § 6503, requires that the notice of appeal, or a copy thereof, with proof of its service, shall be filed with the clerk of the superior court within five days after its service. It has been frequently held that this requirement is jurisdictional. *Puckett v. Moody*, 17 Wash. 609, 50 Pac. 494; *Hibbard v. Delanty*, 20 Wash. 539, 56 Pac. 34; *Van Dusen v. Kelleher*, 20 Wash. 716, 56 Pac. 35; *Best v. Best*, 22 Wash. 695, 60 Pac. 58.

In view of the foregoing, it is unnecessary to discuss other points urged against the sufficiency of the notice and the appeal bond. The appeal is dismissed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5184. Decided March 11, 1905.]

HENRY A. SHAW *et al.*, *Appellants*, v. FRANK BENESH
et al., *Respondents*.¹

APPEAL AND ERROR—REVIEW—FINDINGS—EXCEPTIONS. Findings, not excepted to, will not be reviewed on appeal, although exceptions were taken to respondents' proposed findings, which were materially altered by the court.

VENDOR AND PURCHASER—CONTRACT TO PURCHASE LANDS—DEFAULT IN PAYMENT—TIME OF ESSENCE—RESCISSION—PLEDGES—CONTRACT PLEDGED AS SECURITY—CONSENT OF PLEDGEE TO RESCIND. where a contract for the sale of land makes time of the essence thereof, and the vendor, after pledging the contract as security for a loan, commences an action for a rescission for non-payment of the amount due, plaintiff is not entitled to rescind upon the strict terms of the contract making time of the essence without the consent of the pledgee or without giving him an opportunity to perform the contract.

¹Reported in 79 Pac. 1007.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 9, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for a rescission of a contract to sell land. Affirmed.

Connor & Hand, for appellants.

A. E. Gallagher, for respondents.

PER CURIAM.—The complaint alleges, substantially, that on the 2d day of June, 1902, the plaintiffs and the defendants entered into a contract for the sale of certain real property, in which time was made of the essence thereof. It is further alleged that the defendants were put into possession of the property in pursuance thereof, and have since continued in possession, but have failed and neglected to comply with the terms of said contract, in that they failed and neglected, on or before the 1st day of January, 1903, to pay \$300, as provided therein; that plaintiffs thereupon elected to rescind said contract, and demanded possession of the property, and their costs of this action.

The answer of the defendants admitted the allegations as stated above, but, as an affirmative defense, alleged that, on the 29th day of January, 1903, they tendered to the plaintiffs the full amount due on January 1, 1903, under the contract, with interest, which was refused; and they bring into court said amounts to keep said tender alive. The tender of the defendants is made subject to a claim of a deduction of \$137.50, for timber cut and removed from the land by the plaintiffs. The answer further sets up, that on the 27th day of March, 1903, a writ of garnishment was served upon these defendants, growing out of an action brought by one Phil T. Becker, against the plain-

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tiffs in this action, upon two certain promissory notes, amounting to \$150, dated in November, 1902, which said notes were secured by a pledge of the contract in question, and that the possession of said contract had been surreptitiously obtained by the said Shaw prior to January 1, 1903, and that he still wrongfully retained it.

These defenses were each and all of them demurred to, the demurrer was overruled, and an exception allowed. Subsequently the plaintiffs replied to the answer, denying the material allegations thereof, but admitted that, after the defendants defaulted in the payments provided for in said contract, they did take possession of said property, and did cut timber for their own use, to the value of \$30, and no more. The cause went to trial before the court, and in due time findings of fact and conclusions of law were made by the court, and a decree entered, denying the prayer of the complaint and decreeing a specific performance of the contract. The plaintiffs appeal.

The plaintiffs did not except to the findings of fact and conclusions of law found by the court, but they did except to the findings and conclusions proposed by the defendants. As the findings of fact and conclusions of law proposed by the defendants were materially altered by the court, both in respect to the number of the paragraphs, and the substance thereof, we do not feel called upon to make any investigation thereof. However, the ruling of the court, in overruling the demurrers to the affirmative defenses set up in the answer, is properly before us for consideration, especially, since the evidence in no manner departed therefrom.

The appellants seem to rely upon the strict terms of the contract making time of the essence thereof, but, in view of the peculiar circumstances of this case, it will be unneces-

sary for us to pass upon that point, for prior to the time the defendants defaulted, plaintiffs had pledged the contract in question to one Phil T. Becker, as security for a loan of \$150, and the lower court found as a fact that, at the date of the commencement of this action, the said Becker was the holder, and entitled to the possession, of said contract. It would seem, therefore, that, as a matter of equity, plaintiffs should not be entitled to rescind the contract without the consent of the said Becker, to whom the contract was pledged, or at least, without giving him an opportunity to perform the contract, and thus protect his security. Otherwise, the farm being the homestead of the plaintiffs, and exempt from execution, the plaintiffs would, by their own act, be permitted to destroy the security given to said Becker, and defraud him of the amount due him on his notes. Under all of the circumstances of this case, we are satisfied that the lower court was right in overruling the demurrer to the answer, and in granting specific performance.

Judgment affirmed.

[No. 5445. Decided March 13, 1905.]

In the Matter of the Adoption of ALICE B. CLIFFORD, an Infant.

PETER A. CLIFFORD, *Petitioner and Appellant*, v.

HERBERT O. WILLIAMS *et al.*, *Respondents*.¹

APPEAL AND ERROR—EXCEPTIONS—REVIEW OF FINDINGS. Where no exceptions are taken to findings, the only question before the appellate court is the sufficiency of the findings to support the order.

¹Reported in 79 Pac. 1001.

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JUDGMENTS—RES ADJUDICATA—VALIDITY OF DECREE OF ADOPTION—DETERMINED IN HABEAS CORPUS PROCEEDINGS BETWEEN SAME PARTIES—COLLATERAL ATTACK. The validity of a decree of adoption, litigated and determined in a habeas corpus proceeding, is *res adjudicata*, in a subsequent proceeding between the same parties to vacate the decree of adoption, and it is immaterial that the decree was only collaterally attacked in the habeas corpus proceedings, where the adverse party waived the form of attack and its validity was determined by a court of competent jurisdiction.

Appeal from a judgment of the superior court for King county, Hatch, J., entered June 23, 1904, after a hearing on the merits before the court without a jury, dismissing a petition to vacate a decree of adoption. Affirmed.

W. H. White (*J. J. Burt*, of counsel), for appellant.

Sweeney & Steiner, for respondents.

RUDKIN, J.—On the 20th day of January, 1904, the petitioner sued out a writ of habeas corpus from the superior court of King county, to obtain the custody and control of his minor daughter, Alice B. Clifford. The defendants, Herbert O. Williams and Grace E. Williams, made return to said writ, claiming the right to the custody and control of said minor by virtue of a decree of adoption, theretofore entered in the superior court of said county, and for other reasons not material to be stated here. At the hearing had on the writ and the return thereto, the court dissolved the writ, and awarded the care and custody of said minor to the defendants above named. On the 8th day of January, 1904, the petitioner filed in the superior court of said county his petition, praying that the order or decree of adoption, theretofore entered in said court on the 12th day of November, 1903, whereby the said minor was adopted by the defendants herein, be

vacated and set aside. The defendants filed their answer to said petition to vacate, and, upon the hearing had thereon, the court made the following finding:

"That on or about the 20th day of January, 1904, the petitioner, Peter A. Clifford, filed in the superior court of the State of Washington, for King County, in the cause No. 41727 entitled 'Peter A. Clifford, petitioner, vs. Herbert O. Williams and Grace E. Williams his wife, respondents,' a petition praying for habeas corpus for the purpose of bringing the body of Alice B. Clifford before the court to abide such order as the court might direct. That all the issues raised in the petition to set aside the decree of adoption now under consideration, were raised in said petition for a writ of habeas corpus; that to said petition for a writ of habeas corpus respondents made a full and complete return, and that upon said petition and return and the issues thereby raised, a full and complete hearing was had in said superior court on the 20th day of January, 1904; that all the matters and things including the validity of said decree of adoption, were raised and fully presented to the court in said cause No. 41727, and by said court, passed on and adjudicated; that the parties before the court in said cause No. 41727 were identical with the parties now before the court; that no new facts have since arisen, and that the issues now before the court are in consequence of said proceedings in cause No. 41727 *res adjudicata*."

And the petition was accordingly dismissed. From the order of dismissal, this appeal is taken. No exception was taken to the above finding, and, therefore, the only question before this court is the sufficiency of said finding to support the order appealed from. *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731; *Fremont Milling Co. v. Denny*, 12 Wash. 251, 40 Pac. 1062; and numerous other cases in this court. If the validity of this decree, or order of adoption, was directly in issue in another proceeding, be-

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tween the same parties, in a court of competent jurisdiction, and the validity of such order or decree was there adjudicated and determined, it would seem to require no argument to show that such adjudication was binding upon the parties to this proceeding, and that the judgment of dismissal was properly entered.

"It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein." Black, *Judgments* (2d ed.), § 609.

"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision." Freeman, *Judgments* (4th ed.), § 249.

"The principle is recognized and supported in most of the American cases, that a decision upon any material point is conclusive, though the subject-matter of the two suits is different." *Id.*, § 253.

"By the rules of the civil as well as of the common law, '*res judicata*' is not changed by a change in the form of action.' It is not material that the form of action be the same, if the merits were tried in the first." *Id.*, § 255.

"The principle of *res judicata* is also applicable to proceedings on *habeas corpus*, so far at least as they involve an inquiry into and a determination of the rights of conflicting claimants to the custody of minor children. The decision on a former writ is conclusive in a subsequent application, unless some new fact has occurred which has altered the state of the case or the relative claims of the

parents or other contestants to the custody of the child in some material respect. The principles of public policy requiring the application of the doctrines of estoppel to judicial proceedings, in order to secure the repose of society, are as imperatively demanded in the cases of private individuals contesting private rights under the form of proceedings in *habeas corpus* as if the litigation were conducted in any other form. Otherwise, as is well stated in the opinion of Senator Paige, 'such unhappy controversies as these may endure until the entire impoverishment or death of the parties renders their further continuance impracticable. If a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata*, the consequence will be lamentable. This favored writ will become an engine of oppression, instead of a writ of liberty.' " Id., § 324.

It is no answer to say that the decree or order of adoption was attacked collaterally in the *habeas corpus* proceedings. Parties are estopped to take inconsistent or contradictory positions in courts of justice. Black on Judgments (2d ed.), § 632. The rule that a judgment cannot be attacked in a collateral proceeding is a rule of policy and convenience. The parties for whose benefit the rule exists may waive it. If a judgment is attacked in a collateral proceeding, and the adverse party waives the form of attack, and the issues are determined by a court of competent jurisdiction, such determination is binding and conclusive upon the parties, unless set aside in some manner authorized by law. Neither party will thereafter be heard to say that the second judgment is not binding, because it was brought about by a collateral attack upon the first. The conclusion at which we have arrived renders it unnecessary that we should go further into the history of this unhappy family. The record in this case demonstrates the wisdom of the rule we have been discussing.

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Statement of Case.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ.,
concur.

ROOT and CROW, JJ., took no part.

[No. 5574. Decided March 15, 1905.]

S. NORMILE, *Respondent*, v. R. H. THOMPSON *et al.*,
Members of the Board of Public Works of Seattle,
Appellants.¹

LABOR—PUBLIC WORKS—EIGHT-HOUR DAY—CONSTITUTIONAL LAW—RIGHT OF CONTRACT. An ordinance prescribing an eight-hour day, and forbidding the employment for longer hours of any laborer upon municipal construction work, making the same a part of all city contracts for such work, and providing a penalty for any violation thereof by any city contractor, is not unconstitutional as in conflict with the fourteenth amendment or any other federal or state constitutional provision, since the same relates only to public works, and the state has a right to do its work in any manner it sees fit, and no violation of private rights is involved.

APPEAL AND ERROR—REVIEW. Where a case is tried in the court below solely on the theory of the unconstitutionality of a statute, the party will not be heard in the supreme court on the theory that the case came within certain exceptions to the statute.

Appeal from a judgment of the superior court for King county, Bell, J., entered September 13, 1904, dismissing an action for an injunction, upon sustaining a demurrer to the defendants' answer. Reversed.

William Martin and *W. A. Keene*, for respondent.

Mitchell Gilliam and *Hugh A. Tait* (*S. H. Piles* and *Dallas V. Halverstadt*, of counsel), for appellants.

¹Reported in 79 Pac. 1095.

ROOT, J.—This case involves the “Eight hour law” of 1903. Respondent, on the 30th day of July, 1903, entered into a contract with the city of Seattle to do some street improvement work. By the terms of his contract, he agreed to obey all laws and ordinances controlling or limiting those engaged on the work. While the work was progressing, it being ascertained that his employees were working more than eight hours per day, the city notified him to cease violating his contract in this particular, and at length threatened to cancel his contract, if he did not desist. He brings this action to enjoin the city’s officers from thus interfering with his contract. Appellants interposed a demurrer to his complaint, which was overruled by the trial court; and they electing to stand upon their demurrer, judgment and decree was entered in favor of respondent, from which an appeal has been taken to this court.

The trial court appears to have based its decision solely upon the alleged unconstitutionality of the statute. Since said trial, and since the preparation of the principal briefs in the case, this court handed down an opinion in the case of *In re Broad*, 36 Wash. 449, 78 Pac. 1004, wherein an ordinance of the city of Spokane, requiring only eight hours of work per day on public works, was held to be constitutional. Appellants submit that this decision is conclusive of the questions involved in the case at bar. On the oral argument, respondent’s counsel made some contention that the case referred to was not conclusive of this case, as there were certain considerations involved here which brought respondent’s contract within the exceptions of the statute, and took it out of the rule of the case just cited. We do not think this contention can be upheld. It appears that this case was tried in the lower court solely

upon the question of the constitutionality of the statute referred to. Where a case is tried solely upon a certain theory in the trial court, it will not ordinarily be tried upon any other in the appellate court. Besides, we are unable to see that there is anything in the complaint herein that would prevent the decision in the case of *In re Broad* from being applicable and controlling.

The judgment and decree of the honorable superior court is reversed, and the cause remanded to that court, with instructions to dismiss the action.

MOUNT, C. J., CROW, and DUNBAR, JJ., concur.

HADLEY, FULLERTON, and RUDKIN, JJ., took no part.

[No. 5244. Decided March 15, 1905.]

THE TACOMA LEDGER COMPANY, *Respondent*, v. THE
WESTERN HOME BUILDING ASSOCIATION *et al.*, *Defend*
ants, THE CALIFORNIA, OREGON & WASHINGTON
HOMEBUILDER'S ASSOCIATION, *Appellant*.¹

CORPORATIONS—FRAUDULENT CONVEYANCES—SELLING OUT TO ANOTHER CORPORATION. The assets of an insolvent corporation being a trust fund for the benefit of creditors, one corporation cannot dispose of all its stock, assets and business to another corporation, itself ceasing to do business, and neither corporation making provision for the payment of the debts of the selling corporation.

SAME—DIVIDING CAPITAL STOCK AMONG STOCKHOLDERS—ASSETS SOLD TO ANOTHER CORPORATION. An arrangement whereby all the property and business of a corporation is to be sold and turned over to another corporation in consideration of shares of the capital stock of the purchasing corporation, issued to and for the benefit of the stockholders in the selling corporation, which agreed to cease to do business, is in violation of Bal. Code, § 4265,

¹Reported in 79 Pac. 992.

making it unlawful for the trustees to divide, withdraw, or in any manner pay to stockholders any part of the capital stock of a corporation, and is fraudulent as to creditors.

SAME—BONA FIDE PURCHASER—NOTICE OF DEBTS. In such a case if the selling corporation was in failing circumstances at the time of the transfer, the fact that the purchaser was unaware of the indebtedness is immaterial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 21, 1903, upon the pleadings, on motion of the plaintiff, in an action to set aside a fraudulent conveyance. Affirmed.

Frederick R. Burch, for appellant.

J. B. Alexander, for respondent.

DUNBAR, J.—The complaint alleges that the plaintiff is a domestic corporation; that the defendant The Western Home Building Association is a like corporation; that the defendant The California, Oregon & Washington Homebuilder's Association is a foreign corporation, organized and existing under the laws of the state of California, with like powers as the Western Home Building Association; that a judgment was recovered by plaintiff against the defendant the Western Home Building Association, in the sum of \$187, with \$16.80 costs, and alleges the entry of said judgment; that the Western Home Building Association was, at the time of the entry of said judgment, and for some time before, in a failing and insolvent condition, which fact was known to the trustees of said corporation; that, on or about the date of the entry of said judgment, namely, the 25th day of March, 1902, stockholders of the Western Home Building Association, with the consent and assistance of the trustees and all the officers thereof, made and entered into a fraudulent and illegal agreement with the California, Oregon & Washington Homebuilder's Association, whereby

all the capital stock of the Western Home Building Association, and all the properties and assets of every kind, should be sold and turned over to the California, Oregon & Washington Homebuilder's Association, for the consideration of 40,000 shares of the capital stock of the California, Oregon & Washington Homebuilder's Association, which said stock was to be issued to, and for the benefit of, the stockholders and officers and trustees of the Western Home Building Association, the trustees being named in the complaint; and that it was agreed that the Western Home Building Association should cease to do business in the state of Washington, and alleges the consummation of this plan, and the turning over of all of the properties of the Western Home Building Association to the California, Oregon & Washington Homebuilder's Association, naming the assets, and alleging that the California, Oregon & Washington Homebuilder's Association has since been receiving and appropriating to its own use and benefit the said money so received, and refuses to apply the same to the satisfaction of the judgment above referred to; that the California, Oregon & Washington Homebuilder's Association knew of the insolvency of the Western Home Building Association, at the time of this transaction, and had notice of the indebtedness of the Western Home Building Association.

The appellant's demurrer to this complaint was overruled, and the appellant then answered, and denied any knowledge of the insolvency of the Western Home Building Association, denied entering into any fraudulent and illegal plan with said association, and denied any knowledge of the indebtedness of said association, to plaintiff, and denied generally all of the allegations of the complaint; and affirmatively pleaded that the alleged board of directors in the Western Home Building Association

ceased to be such directors on or about the 9th day of March, 1902; that on or about the 24th day of March, 1902, the Western Home Building Association, agreeing through its authorized officers and board of trustees, and with full acquiescence and authority of all its stockholders, proposed to the California, Oregon & Washington Homebuilder's Association that they purchase the business conducted by the said Western Home Building Association, and that they did purchase the entire business of said association, being all its property and assets, and the entire capital stock of the said corporation. At the time of said purchase the Western Home Building Association represented to the California, Oregon & Washington Homebuilder's Association that the said Western Home Building Association was thoroughly solvent, and that there were no debts of any kind existing against the same save and except the current expenses of the said month of March, 1902, amounting in all to about \$250; and that the said California, Oregon & Washington Homebuilder's Association paid to said Western Home Building Association the sum of \$250 for the express purpose of liquidating the current expense account. This is a sufficient recital of the pleadings, we think, to bring the material issues under discussion. On these pleadings plaintiff moved for judgment, which said motion was granted, and judgment entered thereon, and this appeal is taken from said judgment by the California, Oregon & Washington Homebuilder's Association.

It is assigned that the court erred: (1) in overruling the demurrer to the complaint; (2) in granting the motion for judgment on the pleadings; and (3) in pronouncing judgment thereon. These assignments all raise the single question of the right of one corporation to dispose of

all its capital stock and assets to another corporation, transferring its business to the purchasing corporation, itself ceasing to do business, neither corporation making provision for the payment of the debts of the selling corporation. This court, in a line of cases commencing with *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, and in an unbroken line of authority down to the present time has held that the assets and property of an insolvent corporation are a trust fund for the benefit of creditors, and that no transfer or subterfuge would be countenanced which prevented an equal distribution of such fund between creditors of the corporation. In addition to this, the law, in an earnest attempt to protect creditors of such corporations, has provided in Bal. Code, § 4265:

“It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation or by-laws; and in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of directors at the time, or were not present when the same did happen, shall, in their individual or private capacities, be jointly or severally liable to the corporation, and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out: Provided, That this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter.”

This statute has not been construed by this court, but it seems to us that its object was to prevent such transactions as the one which was presented in defense by the appellant in this case. A similar statute, however, has been construed in the state of California in *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, where it was held that any arrangement which would have the effect to withdraw the capital of an incorporated company and turn it over to the stockholders, except in the manner provided by law, was in violation of that provision of the statute which forbids the trustees to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, and was void as to any creditors of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit. The transaction in that case, as far as the principles involved are concerned, is identical with the case at bar. In speaking upon this subject the court said:

"The policy which dictated that provision is obvious. Persons dealing with corporations do so upon the faith that its property and all its assets, of whatsoever nature, are vested in trustees or managers, to be held by them as a fund which shall be primarily liable for its debts. For although the stockholders, and in some events the trustees, may be individually liable to creditors, it is the property and capital of the corporation to which creditors chiefly look, and which give it credit in the community. To protect the rights of creditors and to guard against improvident or fraudulent conduct on the part of trustees and stockholders, the Legislature has wisely provided . . . This language leaves no room for construction or doubtful interpretation. It is direct, explicit and unmistakable. But it was not intended to interfere with the plenary power of the trustees over the legitimate business of the corpora-

tion. They may manage, control and alienate its property in the regular course of its business, but they cannot devote the proceeds, beyond the surplus *profits*, to the stockholders, either directly or indirectly, until after all its debts are paid."

The same doctrine was reaffirmed in *Higgins v. California Petroleum etc. Co.*, 122 Cal. 373, 55 Pac. 155, and in *Schaake v. Eagle Automatic Can Co.*, 135 Cal. 472, 63 Pac. 1025. If the corporation was in failing circumstances at the time of the transfer, the answer of the defendant that it was not aware of the indebtedness will not avail it. For, with or without that knowledge on the part of the appellant, the property of the corporation is still a trust fund for the benefit of creditors. Attempts of this kind to avoid the payment of debts by consolidation, or by changing the name of corporations, have been often before the courts, and by all modern decisions have been forcibly condemned; and it is held a fraud on the creditors for the stockholders to withdraw the assets of the corporation leaving debts of the corporation unpaid. In the case of *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.*, 13 Fed. 516, the following excerpt from the opinion of the court is very much in point. The court says:

"The purchaser knew that it was buying all the property of the seller, and that, by the transaction, the latter was being deprived of the means and power of meeting any of its outstanding obligations. The fair inference from the transaction is that the old company was about to be dissolved and cease to be. . . . By the transfer, the creditors of the old company were deprived of the means of enforcing their claims. . . . It has received, it is true, paid up stock in the new company, but that has doubtless been disposed of; or . . . it may at any moment be transferred. Equity will not compel the creditor of a corporation to waive his right to enforce his claim

against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock. . . . A distinction with respect to transactions of this character exists between a corporation and a natural person. . . . The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence, and place itself practically beyond the reach of creditors, and this without assuming its liabilities."

We think under all the authorities the judgment was correct, and it is therefore affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5069. Decided March 15, 1905.]

JULIN MINDER, *Respondent*, v. ERNEST MOTTAZ *et al.*,
Appellants.¹

APPEAL AND ERROR—REVIEW. Findings upon conflicting evidence will not be disturbed when the evidence does not preponderate against the same.

CO-TENANCY—IMPROVEMENTS—WHEN NOT CHARGED AGAINST CO-TENANT—OTHER LAND IN LIEU OF IMPROVED LOTS. In an action by a tenant in common to recover a half interest in real estate, deed for which was held by the co-tenants under a claim that plaintiff's interest was only in the nature of a loan, the defendants are not entitled to charge the land with the value of their improvements, where the plaintiff's testimony was undisputed that it had been agreed that plaintiff was to deed the defendants the improved lots and receive an equal quantity of land in lieu thereof, and judgment should be entered for such division.

Appeal from a judgment of the superior court for Stevens county, Richardson, J., entered September 21, 1903,

¹Reported in 79 Pac. 996.

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upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover an interest in real property. Modified.

J. A. Rochford and Danson & Huneke, for appellants.

C. A. Mantz, for respondent.

FULLERTON, J.—On January 17, 1900, J. M. Corbet and wife entered into a contract with Ernest Mottaz and Albert Beach, by which the former agreed to sell to the latter certain real property, situated in Stevens county, for a consideration of \$900. Beach, it seems, was either unable or unwilling to pay for his interest, and assigned the same in writing to the respondent herein. The respondent paid to the appellant Mottaz, at the time of the assignment, \$250, which went towards the purchase price, and later on paid him, in money and money's worth, the balance of his share of the purchase price. Thereafter Mottaz paid the amount owing on the purchase price to Corbet and received a deed running, in accordance with the original contract, to himself and Beach. Later Beach conveyed his interest in the title thus acquired to Mottaz. The respondent thereupon demanded of Mottaz a conveyance to himself of an undivided one-half interest in the property, which was refused him; Mottaz contending that any money the respondent had advanced toward the purchase price of the land was advanced by way of a loan, and gave the respondent no interest whatever in the property itself. The court, however, adopted the respondent's theory, and entered a judgment awarding him an undivided one-half interest in the property.

The questions submitted by the record are wholly questions of fact. Each side has been able to produce a number of witnesses, and to advance a number of circum-

stances, to support its contention, and the record does not leave the question at issue entirely free from doubt. But we are not prepared to say that the trial court did not reach a correct conclusion. Its opportunity to judge of the credibility of the witnesses is much better than is this court's, and, when the evidence seems not to preponderate against its conclusions, it is our practice to follow the lower court. On the main question, therefore, its finding will be affirmed.

The appellants, however, contend that they have placed improvements on the property aggregating \$1,500, and that the court, in awarding an undivided half interest in the land to the respondent, should have charged such interest with one-half of the value of the improvements, and ask us to direct an amendment to the decree, at least in this particular. But it seems that the appellants are not entitled to the order as asked for. The respondent testified, without contradiction, that it was understood that he was to deed to Mrs. Mottaz his interest in the lot on which the improvements were placed, and receive from the appellants a deed for their interests in an equal quantity of land to be selected near by. This being true, the judgment should have provided for the exchange as agreed upon, and is erroneous in that particular.

The order of this court will be, therefore, that the judgment be reversed, and the cause remanded with instructions to enter a judgment awarding to the appellants the lot upon which the improvements stand, and to the respondent, an equal quantity of land in lieu thereof; and that the remainder be awarded to the parties as tenants in common. If the parties cannot agree on what land shall be awarded the respondent in lieu of the lot on which the improvements stand, the court shall make the award, tak-

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Statement of Case.

ing such further evidence as it deems necessary. Neither party will recover costs in this court.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5313. Decided March 15, 1905.]

J. T. HEFFERNAN, *Respondent*, v. THE UNITED STATES
FIDELITY & GUARANTY COMPANY, *Appellant*.¹

37	477
37	522
38	351

CONTRACTS—BUILDING HULL OF VESSEL—SPECIFICATIONS PART OF CONTRACT. A contract to build the hull of a vessel in accordance with specifications attached, includes superstructure to be built on the main deck, masts, rigging and other equipment particularly enumerated as part of the hull in the specifications.

INDEMNITY—PRINCIPAL AND SURETY—CONTRACTOR'S BOND TO COMPLETE VESSEL—NOTICE OF DEFAULT—FAILURE TO GIVE WITHIN TIME—RELEASE OF SURETY—DEMURRAGE FOR DELAY. Where a contractor's indemnity bond provided that notice of any default by the contractor must be given the surety within thirty days, and the contract provided that the hull of the vessel should be ready for machinery September 15, and completed ready for trial October 15, and notice of default in both particulars was given October 17, together with a demand that the surety complete the contract, the failure to give notice of the first default within thirty days releases the surety from liability for the demurrage charged for the non-completion of the vessel on time, since the law cannot say how much of the demurrage would have been saved by timely notice; but the surety is not released from liability for the cost of completing the vessel, where it refused to complete the same and where the failure to give notice of the first default did not affect the relation of the surety with reference to the second default; since a compensated surety can only insist upon forfeiture clauses where the failure to comply therewith probably inflicts a loss on the surety.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 18, 1904, upon findings

¹Reported in 79 Pac. 1095.

in favor of the plaintiff after a trial on the merits before the court without a jury, in an action upon an indemnity bond. Reversed.

James B. Murphy, for appellant.

Ira Bronson and *D. B. Trefethen*, for respondent.

FULLERTON, J.—In 1902, the respondent, Heffernan, contracted with the Port of Portland to build and equip for it a tugboat, to be known as the "John McCracken," according to plans and specifications furnished him by that corporation. The respondent sublet a part of the work to the defendant Ballard Dry Dock & Ship Building Company. The contract was in writing, and expressed in the form of a letter addressed to the respondent by the defendant, and an acceptance of the proposition therein contained by the respondent. In the letter the Ballard Dry Dock & Ship Building Company offered "to build the hull of the steamer John McCracken, according to the drawings submitted and specifications attached, including all terms and conditions therein, for the sum of eight thousand six hundred dollars. . . ." Attached to the letter were the specifications of the hull, as furnished the respondent by the Port of Portland; these having been submitted to the company by the respondent at the time of the negotiations leading up to the contract. The contract was dated July 23, 1902. The specifications provided, under the title, "General Conditions," among other things, that the "hull house and equipment are to be furnished by the hull contractor," and that the hull should be ready for machinery September 15, 1902, and completed ready for trial, October 15, 1902. Then followed, under the title "Specifications of Hull," specifications for the construction and equipment of a steam sea-going vessel, complete with the exception of the engines and boilers.

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The respondent exacted, of the ship building company, surety for the faithful performance of the contract, as a condition precedent to his entering into it. The ship building company offered the appellant as such surety, and, on being accepted as such, it gave a bond in the amount of the contract price, conditioned that it would save harmless the respondent from any pecuniary loss resulting from the breach of any of the terms, covenants, or conditions of the contract, on the part of the ship building company to be performed. The general condition was, however, subject to several provisos, among which was the following:

“First—That no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the surety at its office in the city of Baltimore, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid before making to the principal the final payment provided for under the contract herein referred to.”

The ship building company failed to carry out its contract, and the respondent was compelled to build and equip the hull at his own cost. In doing so he paid for labor and materials the sum of \$1,616.50 in excess of the contract price, and \$1,029.15 as demurrage to the Port of Portland because of his failure to deliver the vessel on the contract time, making a total of \$2,645.65 more than the contract price. This action was brought to recover from the ship building company and the appellant the amount so paid. Judgment went against them for the amount claimed, and this appeal is from that judgment.

The appellant first contends that the recovery allowed for the excess of labor and materials is too large, in that the court allowed a recovery for the costs of the superstructure built on the main deck, the masts and their rigging, the life boats, compass, and other equipments used about a ship, which, it argues, can be no part of the "hull" of a vessel, and cannot, therefore be included within a contract for the construction of a "hull." Had the contract of the Ballard Dry Dock & Ship Building Company been for the construction of the hull of a steam vessel without further specification, it may be that the appellant could successfully claim that the furnishings above enumerated would not fall within the descriptive term. But such was not its contract. It contracted "to build the hull of the steamer John McCracken according to . . . specifications attached," and the furnishings mentioned were specially and particularly enumerated as a part of the hull in the specifications attached to the contract. These specifications, therefore, became as much a part of the contract by this reference as they would have been had they been especially incorporated in it; and being thus a part of the contract, it can make no difference what the heading was, under which they were designated.

The other contention is that appellant was relieved from its liability because of the failure of the respondent to give it timely notice of the breach of the contract on the part of the ship building company. By the terms of the contract, as we have said, the ship building company agreed to have the vessel ready for machinery by September 15, 1902, and completed ready for trial by October 15, 1902. It did not have the vessel ready for machinery at the first date named, nor did it have the boat completed and ready for trial at the latter date. Notice was sent the appellant of these failures on October 17, 1902. The appellant contends that this notice was too late to comply with the con-

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dition of the bond above quoted, because given more than thirty days after the breach of that condition of the contract wherein the builder agreed to have the vessel ready for machinery by September 15, 1902. But we have held, in similar cases, that it was not necessarily fatal to the right of the obligee to recover on the bond that notice of the failure of the principal to comply with the terms of the contract was not given at the time the bond prescribes. While it is true that the requirement of notice is for the surety's benefit, and it may insist on a strict compliance with the terms of the bond in that respect wherever failure to give such notice might result in a loss to it, yet when the notice serves its purpose as well when given after the prescribed time as it does before—that is, when it is equally effective in protecting the surety from loss—it is inequitable, and a manifest abuse of the purposes of this provision of the bond, to hold that the mere technical variance shall relieve the obligor entirely; the surety, being a compensated surety, can insist only on those forfeiture clauses of its contract the failure to comply with which probably inflicts upon it a loss. Now in this case, notice given within the time limited might possibly have relieved the surety from the payment of a part of the demurrage, charged for the non-completion of the vessel on time, and because the law cannot say how much of this demurrage, timely notice might have saved, the law, for fear of exacting too much, will not require payment of any part of it. But the most exacting search of the record fails to disclose why the failure to give notice of the first breach in any way changed the relation of the appellant with reference to the second, the failure of the contractor to go on and complete the vessel. It not only had notice of the abandonment of work thereon, but a specific demand was made upon it to complete the vessel, and the respond-

ent took up the work only after the appellant had, by its inattention and silence, made it apparent that it intended to do nothing in the matter. We think the appellant should be held liable for the cost of the vessel paid by the respondent in excess of the contract price. This sum we find to be \$1,616.50.

The judgment of the trial court will be reversed and the cause remanded with instructions to enter a judgment against the defendant, the Ballard Dry Dock & Ship Building Company, and the appellant, The United States Fidelity and Guaranty Company, for the sum of \$1,616.50, together with interest thereon from the 1st day of March, 1904, at the legal rate. The appellant will recover its costs on this appeal.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5272. Decided March 15, 1905.]

PHILIP J. BRADY, *Appellant*, v. R. ONFFROY, *Respondent*.¹

APPEAL—ORAL NOTICE—SUFFICIENCY—SURETY ON BOND GIVEN TO DISCHARGE ATTACHMENT. Oral notice of appeal in open court from an order modifying a judgment is sufficient as to a surety on a bond given by the defendant to discharge an attachment, since the surety appears and is before the court, under Bal. Code, §§ 5374, 5375.

APPEAL—APPEALABLE ORDERS—AFFECTING SUBSTANTIAL RIGHTS AFTER JUDGMENT. An order striking from a judgment so much thereof as awards judgment against a surety on a bond given by defendant to discharge an attachment, is appealable as a final order made after judgment which affected a substantial right.

ATTACHMENT—DISCHARGE—RES ADJUDICATA—REJECTION OF SECURITY—SUBSEQUENT MOTION ON GROUND OF IRREGULARITY. An order, made on an order to show cause, refusing to vacate an at-

¹Reported in 79 Pac. 1004.

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Syllabus.

tachment upon the defendant's offer to deposit in court certain stock as security, is not *res adjudicata* or the law of the case upon a subsequent application to discharge the attachment on the ground that the defendant was a resident of this state, nonresidence being the ground upon which the attachment was issued.

APPEAL—DISMISSAL—EFFECT OF AFFIRMANCE—DISCHARGE OF ATTACHMENT. The dismissal of an appeal from an order discharging an attachment has the effect of an affirmance of the order, but gives the order no more vitality than it already had.

ATTACHMENT—DISCHARGE BY BOND—SUBSEQUENT ORDER PURPORTING TO DISCHARGE WRIT FOR IRREGULARITY. An attachment is discharged by the giving of a bond under Bal. Code, §§ 5374, 5375, and thereafter an order purporting to discharge the attachment has nothing upon which it can act and is a nullity for want of subject-matter.

SAME—RELEASE OF SURETY FOLLOWING AS CONSEQUENCE OF VOID ORDER—RES ADJUDICATA—DISMISSAL OF APPEAL. Where an attachment has been discharged by the giving of a bond under Bal. Code, §§ 5374, 5375, and subsequently an order is entered purporting to discharge the attachment for irregularity, which order is a nullity, the granting of a motion to discharge the surety solely as a consequence to follow from the discharge of the attachment for irregularity, is not *res adjudicata* as to the liability of the surety on the bond regardless of the irregularity of the attachment, and does not become so by the dismissal of an appeal therefrom; since the court did not determine the liability of the surety upon any theory other than the irregularity of the writ.

ATTACHMENT—DISCHARGE OF BOND—PROMISE TO PERFORM JUDGMENT—ESTOPPEL TO QUESTION REGULARITY OF WRIT. A bond to discharge an attachment, conditioned to perform the judgment, as required by Bal. Code, §§ 5374, 5375, is an unconditional promise to pay whatever judgment shall be rendered against the defendant, and estops the defendant and surety from thereafter raising any question as to the regularity of the attachment.

SAME—DISCHARGE FOR IRREGULARITY—WHEN QUESTION TO BE RAISED—RELEASE OF PROPERTY—STATUTES—CONSTRUCTIONS. Bal. Code, § 5376, providing that an application to discharge a writ of attachment may be made at any time before or after the "release" of the property, must be construed to refer to a release otherwise than by a previous discharge of the writ by the

filing of a bond therefor, under § 5374, whereby the existence of the writ is ended; since after the discharge by bond there can be no discharge for irregularity.

Appeal by plaintiff from an order of the superior court for Whatcom county, Neterer, J., entered May 18, 1904, modifying the clerk's entry of judgment upon the verdict of a jury, rendered in favor of the plaintiff after a trial on the merits, by releasing from liability thereon the surety upon a bond given to discharge an attachment. **Reversed.**

Fairchild & Bruce, for appellant.

Marshall P. Stafford, for respondent.

HADLEY, J.—This action was brought to recover commissions, earned by plaintiff through services as a broker. The suit was commenced in King county, and the place of trial was afterwards changed to Whatcom county. At the time the complaint was filed, an affidavit and bond in attachment were also filed, the alleged ground for attachment being that the defendant was a nonresident of the state. At the same time an affidavit for a writ of garnishment was also filed, alleging that the Pacific Packing & Navigation Company, a corporation, controlled personal property belonging to the defendant. Writs of attachment and garnishment were issued and served.

Thereafter the defendant appeared, and applied to the court for an order directing the plaintiff to show cause why the attachment and garnishment should not be vacated, if the defendant should deposit in court stock of the garnishee company as security. Such an order to show cause was issued, and after a hearing the court denied the application to vacate. Following the above events, the defendant filed in the cause a bond in the sum of \$26,000, with the American Bonding & Trust Company of Baltimore City as surety. The bond was conditioned

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that the defendant should perform the judgment of the court in the cause. At this point in the history of the case, on May 14, 1902, the venue was changed to Whatcom county. In the following October, on motion of defendant, an order was entered declaring that the attachment and garnishment were thereby vacated, and also declaring that the surety upon the aforesaid bond given by defendant was released and discharged. The plaintiff attempted to prosecute an appeal to this court from said last named order, but the appeal was dismissed. Thereafter the cause was submitted to a jury for trial upon its merits, and a verdict was returned against the defendant in the sum of \$3,450. Upon the return of the verdict, the clerk, under the terms of § 1, Laws 1903, p. 285, entered judgment. The judgment was entered against the defendant, and also the surety upon the aforesaid bond. Some time afterwards, the defendant moved to strike from the record of the judgment so much thereof as awarded recovery against the surety, which motion was granted. The plaintiff has appealed from the order of the court in modifying the judgment.

Respondent has moved to dismiss the appeal. The point is made that there was no service of the appeal notice upon the surety company. The notice was given in open court. By the terms of the statute, the surety company had appeared in the action, and was before the court. Bal. Code, §§ 5374, 5375. The surety company, therefore, had notice of the appeal. It is further urged, upon the motion to dismiss, that the order designated in the notice of appeal is not appealable. It was a final order made after judgment which affected a substantial right of appellant. Such an order is appealable, under Bal. Code, § 6500, subd. 7. The motion to dismiss the appeal is denied.

It is assigned by appellant that the court erred in making the order of October, 1902, purporting to discharge the attachment and release the surety, and it is argued by respondent that that order became *res adjudicata* as to the subject matter involved in this appeal. It will be remembered that an order had been previously entered denying the vacation of the attachment and garnishment. It is argued by appellant that the first order became *res adjudicata*, and that, in the absence of an appeal and reversal for error, it remained the law of the case. The first order was, however, based upon a mere application for the discharge of the attachment upon an order to show cause why it should not be done, if the respondent should deposit stock in court as security. No other ground for the discharge of the attachment and garnishment appears to have been raised at the time that order was made. Subsequently, however, affidavits were filed alleging that the respondent was a resident of Whatcom county, in this state, at the time the attachment and garnishment were sued out. The affidavits appear to have been filed for the purpose of procuring a change of venue to Whatcom county as the proper place for trial. The venue was changed for that reason, and, after the case reached said county, the court made the order of October, 1902, discharging the attachment and bond. The order was based upon the affidavits in the record that the respondent was a resident of this state, the only ground alleged for the attachment being that of nonresidence. The first order was therefore not *res adjudicata*, inasmuch as the subject then adjudicated was not that of residence, but the proposition to deposit stock as security in lieu of the attachment and garnishment.

It will also be remembered that an attempt was made to take an appeal from the order of October, 1902, which

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purported to discharge the attachment and bond. The dismissal of that appeal had the effect of an affirmance of the order. It therefore becomes necessary to determine what force should have been given to that order, at the time the one now appealed from was made. If there was nothing for the order of October, 1902, to act upon, then it was of no force, and its affirmance by the dismissal of the appeal gave it no more vitality than it already had. The respondent's bond was filed in the cause months before that order was made. It was conditioned that the respondent would perform the judgment of the court, and, under the terms of Bal. Code, § 5374, the attachment was thereby discharged. It follows that, when the order of October, 1902, was made, the attachment had long since been discharged by the giving of the respondent's bond. The filing and approval of the bond ended the attachment, and there was no attachment pending before the court at the time the order was made upon which it could operate. It was, therefore, a nullity for want of subject-matter. The same was also true of that part of the order which purported to discharge the surety upon the bond. The motion of respondent sought the discharge of the surety solely as a consequence to follow from the discharge of the attachment. It is manifest that the court did not determine as to the surety's liability upon any other theory. The motion asked for the order merely upon the ground that the attachment was wrongfully issued. The question of the surety's liability without regard to the regularity of the attachment was not before the court. That question was therefore not adjudicated, and the order did not become *res adjudicata*. It was so held in *Wyman v. Hallock*, 4 S. D. 469, 57 N. W. 197, a case involving all the essential features here discussed. The court in that case said:

"If this undertaking became void and of no further effect upon the entry of such order, it was not because the

order so said, but because such was the legal effect of discharging the attachment. If the question of the further life or force of this undertaking was not before the judge, his expression of his opinion thereon, although in the order, was voluntary and obiter, and does not affect the parties or their rights; so that the question here presented is precisely the same as it would have been if the order had made no reference to the bond or undertaking and its cancellation."

From the foregoing it follows that the order of October, 1902, did not adjudicate the surety's unconditional contract liability under the terms of the bond, and the question now before us is, did the court err by striking from the judgment that portion thereof which awarded recovery against the surety? Our statute provides that the bond of the defendant in an attachment proceeding shall contain a promise to perform the judgment of the court. The filing of the bond shall be deemed an appearance in the action, and, if judgment goes against the defendant, it shall also be entered against the surety. Bal. Code, §§ 5374, 5375. It is almost universally held that, under such statutory provisions, the bond becomes an unconditional contract or promise to pay whatever judgment shall be rendered against the defendant upon the merits of the case, and that it does not depend upon the regularity of the attachment branch of the case. The theory of the statutes and decisions is that the consideration for the promise to pay the judgment is the immediate release of the attached property. The giving of the bond effects the immediate discharge of the attachment and release of the property, and the bond then becomes a security for any judgment that shall be rendered against the defendant. The cases hold that, when such a bond has been given under a statute requiring an unconditional promise to perform the judgment of the court, the defendant is thereby estopped to

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raise any question as to the regularity of the attachment. *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776; *Easton v. Ormsby*, 18 R. I. 309, 27 Atl. 216; *Paddock v. Matthews*, 3 Mich. 18; *Ferguson v. Gildewell*, 48 Ark. 195, 2 S. W. 711; *Gardner v. Donnelly*, 86 Cal. 367, 24 Pac. 1072; *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445; *Fox v. Mackenzie*, 1 N. D. 298, 47 N. W. 386; *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841, 8 Am. St. 306; *Hill v. Harding*, 93 Ill. 77; *Kennedy v. Morrison*, 31 Tex. 207.

It is urged here that, under Bal. Code, § 5376, the defendant in attachment may raise the question of the irregularity of the attachment, even after giving the bond, as provided in § 5374. The latter section is, however, complete in itself as to the effect of giving the bond, and expressly states that "the attachment shall be discharged and restitution made of property taken or proceeds thereof." It will be observed that the term "discharged" is used as referring to attachment, which must mean that the attachment then becomes a closed incident in the case. Section 5376 provides that, at any time before or after the "release" of the attached property, or before an actual levy has been made, application may be made that the writ be discharged on the ground that it was improperly issued. This section cannot be consistent with § 5374, if it is held that application may be made to discharge the writ of attachment after it has already been discharged by the giving of the bond. It must therefore refer to a "release" of the property, made voluntarily or otherwise, but without a discharge of the writ. In such case the writ would still be alive, and would require action on the part of the defendant to effect its discharge. But when the bond is given and approved, the writ is thereby discharged, and there is no longer any writ to which an application under § 5376 can be directed.

Therefore, under our law, a defendant in attachment has the option to first try the question of the regularity of the attachment, or to give the bond. If he elects to give the bond, which under our statute must provide for the performance of the judgment of the court, he thereby gains the advantage of an immediate release of the property and discharge of the attachment. But, in lieu thereof, under the above authorities, the bond stands as security for any judgment that may thereafter be rendered against him in the action, and both he and his surety waive any right to attack the regularity of the attachment. Our attention has not been called to any case which holds to the contrary, when the bond contains the agreement to perform the judgment. It was so held in some of the above cited cases, where the bond was not in conformity with any statute, the liability being based upon the contract as a common law obligation. If the bond is in some other form, such as a mere forthcoming bond conditioned to return the property in the event the attachment shall prevail, the obligation is different. But such bonds as our statute requires are held to amount to unconditional contracts to pay the judgment that shall be rendered against the defendant in the action.

It follows that the surety upon the bond given in this case is liable upon the judgment rendered against the defendant, and that the court erred when it struck from the judgment that portion thereof which awarded recovery against the surety.

The order appealed from is reversed, and the cause remanded, with instructions to the trial court to enforce the judgment as originally entered.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5410. Decided March 15, 1905.]

ALICE O. WOOLF, *Respondent*, v. WASHINGTON RAILWAY
& NAVIGATION COMPANY, *Appellant*.¹

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138 325

RAILROADS—NEGLIGENCE—CROSSINGS—TRAVELER FAILING TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE—NONSUIT. A traveler who drives a team upon a railroad crossing at a point where for a considerable distance he had an unobstructed view of an approaching locomotive, is guilty of contributory negligence, as a matter of law, where he drove on to the crossing either without looking or looked and whipped up his horses in an endeavor to cross ahead of the engine.

SAME—EVIDENCE—PRESUMPTION AS TO DUE CARE. The presumption that a traveler used due care and stopped to look and listen before driving upon a railroad crossing, cannot be indulged where it appears from the testimony that for a considerable distance he had an unobstructed view of an approaching locomotive, but drove at a slow walk until within fifty feet or less of the crossing, and suddenly whipped up his horses in an endeavor to cross ahead of the engine.

SAME—DOCTRINE OF "LAST CLEAR CHANCE." The doctrine that the defendant had the "last clear chance" to avoid killing a traveler, who was struck by a locomotive at a railroad crossing, has no application where the deceased was driving at a slow walk until within fifty feet of the crossing and suddenly whipped up his horses in an endeavor to cross ahead of a locomotive moving at a rate of between 12 and 60 miles an hour.

SAME—COMPARATIVE NEGLIGENCE. The doctrine of comparative negligence does not obtain in this state.

SAME—TRIAL—SETTING ASIDE VERDICT NOT SUSTAINED BY EVIDENCE—CONTRIBUTORY NEGLIGENCE. The verdict of a jury upon an issue as to contributory negligence which is contrary to what all reasonable men ought to find upon the undisputed testimony, is not conclusive upon the court, and will be set aside upon appeal.

Appeal from a judgment of the superior court for Clarke county, Miller, J., entered March 23, 1904, upon the verdict of a jury for damages for the death of plaintiff's husband killed at a railroad crossing. Reversed.

¹Reported in 79 Pac. 997.

B. S. Grosscup, James F. McElroy, and A. G. Avery, for appellant, contended, among other things, that a traveler approaching a railroad crossing must look and listen, and at a time when, and place where, it will be effective. *Schofield v. Chicago etc. R. Co.*, 114 U. S. 615; *Texas & Pac. R. Co. v. Gentry*, 103 U. S. 353, 366; *Elliott v. Chicago etc. R. Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38, 29 Pac. 942; *Pyle v. Clark*, 79 Fed. 744; *Kelsay v. Missouri Pac. R. Co.*, 129 Mo. 362, 30 S. W. 339; *Hayden v. Missouri etc. R. Co.*, 124 Mo. 566, 28 S. W. 74; *Moore v. Keokuk etc. R. Co.*, 89 Iowa 223, 56 N. W. 430; *Cleveland etc. R. Co. v. Elliott*, 28 Ohio St. 340; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753; *Brown v. Milwaukee R. Co.*, 22 Minn. 165; *Abbett v. Chicago etc. R. Co.*, 30 Minn. 482, 16 N. W. 266; *Haas v. Grand Rapids etc. R. Co.*, 47 Mich. 401, 11 N. W. 216; *Brady v. Toledo etc. R. Co.*, 81 Mich. 616, 45 N. W. 1110; *Nelson v. Duluth etc. R. Co.*, 88 Wis. 392, 60 N. W. 703; *Blackburn v. Southern Pac. R. Co.*, 34 Ore. 215, 55 Pac. 225; *Salter v. Utica etc. R. Co.*, 75 N. Y. 273; *Schaefer v. Chicago etc. R. Co.*, 62 Iowa 624, 17 N. W. 893; *Cincinnati etc. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Philadelphia etc. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *Butterfield v. Western R. Corp.*, 10 Allen 532, 87 Am. Dec. 678; *Tolman v. Syracuse etc. R. Co.*, 98 N. Y. 198, 50 Am. Rep. 649; *Powell v. New York etc. R. Co.*, 109 N. Y. 613, 15 N. E. 891; *Weyl v. Chicago etc. R. Co.*, 40 Minn. 350, 42 N. W. 24; *Smith v. Maine Cent. R. Co.*, 87 Me. 339, 32 Atl. 967; *Schlimgen v. Chicago etc. R. Co.*, 90 Wis. 186, 62 N. W. 1045; *Owens v. Pennsylvania R. Co.*, 41 Fed. 187; *Snider v. New Orleans etc. R. Co.*, 48 La. Ann. 1, 18 South. 695. His duty is definitely fixed by law.

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Citations of Counsel.

Holmes, *The Common Law*, pp. 111, 112; Shearman & Red., *Negligence*, § 476; Beach, *Contributory Neg.*, §§ 181, 182, 452; 3 Elliott, *Railroads*, §§ 1166-1179. And where there is an omission of that duty the court should direct a verdict. 3 Elliott, *Railroads*, § 1179; *Blount v. Grand Trunk R. Co.*, 61 Fed. 375; *Christensen v. Union Trunk Line*, 6 Wash. 78, 32 Pac. 1018; 2 Shearman & Red., *Negligence*, § 476; *Myers v. Baltimore etc. R. Co.*, 150 Pa. St. 386, 24 Atl. 747. If the deceased could have seen the engine had he looked, the presumption is that he did not look, or looking, did not heed, and in either case he is guilty of contributory negligence. *Huetsch v. Chicago etc. R. Co.*, 87 Wis. 304, 58 N. W. 393; *Railroad Co. v. Houston*, 95 U. S. 697; *Gilbert v. Erie R. Co.*, 97 Fed. 747; Beach, *Contributory Neg.*, § 182; *Artz v. Chicago etc. R. Co.*, 34 Iowa 153; *Wilcox v. Rome etc. R. Co.*, 39 N. Y. 358, 100 Am. Dec. 440; *Kwiatkowski v. Grand Trunk R. Co.*, 70 Mich. 549, 39 N. W. 463; *Indiana etc. R. Co. v. Hammock*, 113 Ind. 1, 14 N. E. 737; *Northern Pac. R. Co. v. Freeman*, 174 U. S. 379. Upon the subject of the presumption that plaintiff exercised due care, the sufficiency of evidence to rebut such presumption is a question for the court. *Menominee River etc. Co. v. Milwaukee etc. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Spaulding v. Chicago etc. R. Co.*, 33 Wis. 582; *Smith v. Northern Pac. R. Co.*, 3 N. D. 17, 53 N. W. 173. The effect of the presumption is merely to shift the burden of proceeding; it is not part of the case and is neither argument nor evidence. McKelvey, *Evidence*, p. 62; Thayer, *Preliminary Treatise on Evidence*, pp. 314, 351, 551, 553; 1 Greenleaf, *Evidence* (16th ed.), pp. 93, 102, 127, 128; Thayer, *Cases on Evidence* (2d ed.), p. 44; *Chase v. Maine Cent. R. Co.*, 77 Me. 62, 52 Am. Rep. 744; *Lisbon v. Lyman*, 49 N. H. 553. The presumption of due care cannot obtain where there is evi-

dence to the contrary. *Dewald v. Kansas City etc. R. Co.*, 44 Kan. 586, 24 Pac. 1101; *Baker v. Chicago etc. R. Co.*, 95 Iowa 163, 63 N. W. 667; *Salyers v. Monroe*, 104 Iowa 74, 73 N. W. 606; *Myers v. City of Kansas*, 108 Mo. 480, 18 S. W. 914; *St. Louis etc. R. Co. v. Whittle*, 74 Fed. 296; *Moberly v. Kansas City etc. R. Co.*, 98 Mo. 183, 11 S. W. 569; *Morton v. Heidorn*, 135 Mo. 608, 37 S. W. 504; *Waldron v. Boston etc. R. Co.*, 71 N. H. 362, 52 Atl. 443; *Glascock v. Central Pac. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Mynning v. Detroit etc. R. Co.*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. 804; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Reading etc. R. Co. v. Ritchie*, 102 Pa. St. 425.

Rands & Hopkins and Bennett & Sinnott, for respondent. Contributory negligence is a question for the jury. *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820. The burden of proof is on the defendant. *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111; *Gallagher v. Town of Buckley*, 31 Wash. 380, 72 Pac. 79. And the credibility of the witnesses is involved, and should be passed upon by the jury. 1 Thompson, Negligence (New ed.), § 434; *Petrie v. Columbia etc. R. Co.*, 29 S. C. 303, 7 S. E. 515; *Downey v. Pittsburg etc. Traction Co.*, 161 Pa. St. 131, 28 Atl. 1019; *Kinard v. Columbia etc. R. Co.*, 39 S. C. 514, 18 S. E. 119. A person killed at a railroad crossing is presumed to have looked and listened and to have used due care. *Dalton v. Chicago etc. R. Co.*, 104 Iowa 26, 73 N. W. 349; *Baltimore etc. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. Ed. 262; *Northern Pac. R. Co. v. Spike*, 121 Fed. 44; *McGhee v. White*, 66 Fed. 502; *Weller v. Chicago etc. R. Co.*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. 592; *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8;

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Citations of Counsel.

Cleveland etc. R. Co. v. Crawford, 24 Ohio St. 631; *Continental Imp. Co. v. Stead*, 5 Otto 161, 24 L. Ed. 403; *Baltimore etc. R. Co. v. Griffith*, 159 U. S. 603, 40 L. Ed. 274; *McBride v. Northern Pac. R. Co.*, 19 Ore. 64, 23 Pac. 814. *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820. This presumption stands in the place of positive evidence and may overcome direct testimony to the contrary. *Weller v. Chicago etc. R. Co.*, *supra*; *Chaperon v. Portland Elec. Co.*, 41 Ore. 39, 67 Pac. 928; *Boyd v. Portland Elec. Co.*, 40 Ore. 126, 66 Pac. 576; *Kinard v. Columbia etc. R. Co.*, 39 S. C. 514, 18 S. F. 119; *Stone v. Boston etc. R. Co.*, 72 N. H. 206, 55 Atl. 359. The rule that the traveler must look and listen, is not an arbitrary rule of law to be applied to every case. *Chicago etc. R. Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071; *Galveston etc. R. Co. v. Harris*, 22 Tex. Civ. App. 16, 53 S. W. 599; *Davis v. Concord etc. R. Co.*, 68 N. H. 247, 44 Atl. 388. The court cannot fix the place at which the traveler shall look; it is a question for the jury. *Hecker v. Oregon R. Co.*, 40 Ore. 6, 66 Pac. 270; *Warren v. Southern Pac. R. Co.* (Cal.), 67 Pac. 1; *Winey v. Chicago etc. R. Co.*, 92 Iowa 622, 61 N. W. 218; *Cummings v. Chicago etc. R. Co.*, 114 Iowa 85, 86 N. W. 40; *Hicks v. New York etc. R. Co.*, 164 Mass. 424, 41 N. E. 721, 49 Am. St. 471; *Louisville etc. R. Co. v. Cooper*, 23 Ky. Law 1658, 65 S. W. 795; *Defrieze v. Illinois Cent. R. Co.* (Iowa), 94 N. W. 505; *Cookson v. Pittsburg etc. R. Co.*, 179 Pa. St. 184, 36 Atl. 194; *Green v. Los Angeles Terminal R. Co.* (Cal.), 69 Pac. 694; *Smith v. Baltimore etc. R. Co.*, 158 Pa. St. 82, 27 Atl. 847; *Moore v. Chicago etc. R. Co.*, 102 Iowa 595, 71 N. W. 569; *Piper v. Chicago etc. R. Co.*, 77 Wis. 247, 46 N. W. 165; *Plummer v. Eastern R. Co.*, 73 Me. 591; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Rodrian v. New York etc. R. Co.*, 125 N.

Y. 526, 26 N. E. 741; *Link v. Philadelphia etc. R. Co.*, 165 Pa. St. 75, 30 Atl. 820, 822; *Ely v. Pittsburgh etc. R. Co.*, 158 Pa. St. 233, 27 Atl. 970; *Chaffee v. Boston etc. R. Co.*, 104 Mass. 108; *Henavie v. New York etc. R. Co.*, 166 N. Y. 280, 59 N. E. 901; *Cleveland etc. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37. It is not always, as a matter of law, negligence to attempt to cross a railroad track in front of a train. *Chicago etc. R. Co. v. Miller*, 46 Mich. 532, 9 N. W. 841; *Robbins v. Fitchburg etc. R. Co.*, 161 Mass. 145, 36 N. E. 752; *Chicago etc. R. Co. v. Corson*, 198 Ill. 98, 64 N. E. 739; *Grand Rapids etc. R. Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183; *Newman v. Delaware etc. R. Co.*, 20 Pa. St. 530, 53 Atl. 345; *Haines v. Lake Shore etc. R. Co.*, 129 Mich. 475, 89 N. W. 349; 2 Thompson, Negligence (New ed.), §§ 1669, 1624.

Root, J.—Respondent's husband, while crossing appellant's railway track, upon a public highway near Vancouver, Washington, was struck by a locomotive and killed. This action was brought for damages, and resulted in : verdict and judgment of \$17,500, in favor of respondent. From said judgment, appeal is taken to this court.

The most important errors assigned turn upon the question of the sufficiency of the evidence to sustain the verdict and judgment. The material facts were substantially as follows: Deceased was riding in an ordinary farm wagon, driving a team of horses from Vancouver along the county road toward his home. About a quarter of a mile south of where the accident occurred, the county road crosses the railroad, and, at a point about two hundred feet west of the track, makes a right angle, and then runs directly north. The railroad track, from the crossing just mentioned, runs in a northerly direction, bearing a little to the west, to a point where it is again crossed by the county road—this crossing being known as "Shaw's crossing," and the cross-

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ing above mentioned being known as "Porter's crossing." For a considerable distance north of Porter's crossing, the public highway and railroad run almost parallel, and about two hundred feet apart, but gradually converge, forming an acute angle at Shaw's crossing. For a considerable distance between the two crossings, there was an orchard, which partially obstructed the view of the railway track from the county road, but the north end of said orchard was a distance of four hundred and seventy-five feet south of Shaw's crossing. In this space there were no trees between the county road and the railway track, although along part of this distance the railway ran through a "cut" with an embankment between seven and eight feet high, which, however, gradually decreased in the direction of Shaw's crossing, until, at the crossing, it disappeared entirely.

Deceased crossed the railroad at Porter's crossing, made the turn on the west side of the track, drove along the highway past the orchard, and was in the act of driving across the railway track at Shaw's crossing, when a locomotive, coming from the same direction as he, collided with his wagon and caused his death. Various diagrams, plats, and photographs were introduced in evidence, showing the location and condition of the railway and county road, and the contour of the ground in that vicinity. It appears beyond question, and is practically conceded, that, if the deceased, at any point within twenty-five feet of Shaw's crossing, had looked along the track toward the engine, he could readily have seen for a distance of from a quarter to a half mile. The established and conceded physical conditions show that, at any point between fifty and one hundred feet, a person could see along the track for a distance of six hundred feet or more; and, as one approached the crossing, he could see much further. At any point

on the highway between one hundred and four hundred and seventy-five feet of the crossing, an engine could be seen at any place on the track for a distance of from four hundred and seventy-five to six or eight hundred feet from the crossing.

The accident occurred in the day time. The deceased had lived in that neighborhood four years or more, and was thoroughly familiar with the crossing, and the conditions surrounding the same. He was a man thirty-three years old, and possessed of good eye-sight and hearing. The evidence as to where he was, when he first saw the approaching engine, is somewhat conflicting. One witness says he was about fifty feet "more or less," from the crossing, driving at a slow walk, when he looked toward the engine, and immediately commenced to whip his horses with the lines, in an effort to cross ahead of the locomotive; others said that he was just about to the track, or crossing the same, and driving at a walk, when he looked and saw the engine, and commenced to whip his horses. There was no evidence of his looking at any other point or at any other time prior to those just mentioned. There is no evidence that he stopped to "look and listen."

The evidence as to the speed of the locomotive varied greatly, the estimates of the speed ranging from twelve to sixty miles per hour. There was a conflict in the evidence as to whether or not the whistle was sounded or the bell rung, and as to when and where.

At the close of plaintiff's case, appellant challenged the sufficiency of the evidence, and moved for an order of the court withdrawing the case from the jury, and dismissing the action. The trial court overruled this motion, to which ruling an exception was taken. At the close of all of the evidence, appellant again challenged its sufficiency, and moved to withdraw the case from the jury, and for a judg-

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ment of dismissal. This motion was also denied, and exception taken. The jury having returned a verdict in favor of respondent in the amount above mentioned, a motion for new trial was interposed, but denied by the court.

We do not think this verdict and judgment can be sustained by the evidence. It is shown conclusively that the deceased, for a considerable distance before crossing the railway track, could at any point, by looking, have seen the approach of the locomotive. It thus follows that either he did not look, or else he did look and attempted to make the crossing ahead of the engine. In either case, he would be clearly guilty of contributory negligence. The trial court, among other instructions, gave the following:

"If you find from the evidence in the case that the deceased, before he reached the crossing, failed to look in the direction from which the engine was approaching and drove upon the crossing, then he was guilty of contributory negligence and you must return a verdict in favor of the defendant. If you find from the evidence in the case that the deceased observed the engine approaching and still endeavored to cross the track and was killed thereby, then I instruct you that his conduct was contributory neglect in the premises and your verdict should be for the defendant. If the deceased looked and saw the engine and endeavoring to beat the engine across the crossing, he was struck, he would be guilty of contributory neglect and cannot recover in this action."

In the light of these instructions, it is inconceivable how the jury could return a verdict for plaintiff, except upon the theory of an absolute disregard both of the evidence and the instructions. The doctrine of "look and listen" is well established, and is applicable to the facts in this case. In the case of *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, the supreme court of the United States said:

"... the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the

deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed to both hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

The same court, in the case of *Northern Pac. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, employs this language:

"If in this case we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred; he did not look, or, if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

In the case of *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38, 29 Pac. 942, this court said:

"While the testimony is uncertain and contradictory in some important particulars, yet as it appears it is a close question whether the plaintiff can escape the charge of contributory negligence. If he could have seen along the track for a long distance while on the level place before go-

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ing down the incline he certainly knew it and should have looked, especially as he could not see an approaching train from the southward for any great distance from the crossing while going down the incline, and he must have known this also, as his testimony shows he was entirely familiar with the situation of the track and street in the vicinity. His counsel claims that the plaintiff did look to the southward for a train while on the level space, but we fail to find any testimony to that effect in the record. On the other hand, if he could not have seen along the track but a short distance so there would have been no object in looking while on this level place, he certainly should have stopped and listened before crossing the track, unless the situation was such that he could not have heard a train any material distance therefrom if he had stopped. If there is ever a case where under other ordinary circumstances a man should stop and listen, it would be where he was unable to see the track or an approaching train for more than a very short distance, and had been so unable to see for some time before reaching the crossing."

In 3 Elliott, Railroads, § 1179, that author says:

"Where there is an omission of the duty of the traveler to look and listen before attempting to cross a railroad track the general rule is that it is the duty of the trial court to direct a verdict for the defendant. In such cases the duty of the traveler is definitely fixed by law and there is no question of fact to be submitted to the jury."

In the case of *Christensen v. Union Trunk Line*, 6 Wash. 75, 78, 32 Pac. 1018, 1019, this court said:

"There is no doubt, therefore, as to what the respondent did at and immediately prior to the accident. And we think that it was his own want of that reasonable care and watchfulness which the occasion demanded that brought about the injury of which he complains. In the first place, it was negligence on the part of the respondent to cross from the east side of the track to the narrow passage on the west without looking for the approach of the car which he knew was about to pass down the hill, if, in fact, as he

claims, it was a dangerous place. And it was still more negligent for him to undertake to cross back when the car was so near him."

Respondent argues, however, that it must be presumed, in the absence of proof to the contrary, that the deceased did look and listen, and that he exercised due care in every regard, and cites many authorities to prove that this is the law. Were there no proof in the case bearing upon this matter, it would probably be proper to indulge this presumption. There is no question but that it may and should be invoked in appropriate cases. But this is not one of them. In this case one witness testified that he saw deceased look toward the engine when about fifty feet from the crossing, and that, instead of stopping his horses or turning them aside, he whipped them up and attempted to cross ahead of the engine; others testified to substantially the same acts, but stated them to have occurred just as he was going upon, or crossing, the track. All of these witnesses stated that he whipped up his horses suddenly from a slow walk, and had them trotting, "loping," or jumping at the time of the collision. All of this would indicate that he had not seen or heard the train prior to such time. If he discovered the train in time to have stopped and avoided the collision, and did not do so, but attempted to beat the engine across the track, he certainly contributed to the cause of the collision. If he drove along slowly for a considerable distance, where he might at any time have looked and seen the approach of the engine, but neglected to do so until it was too late to avoid the collision, it is likewise certain that he contributed to the cause of the catastrophe. In either event, there is no room for indulging the presumption which respondent urges. Such a presumption is not to be invoked where there is competent, material evidence upon the question involved. In the case of *Del-*

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aware etc. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, the United States supreme court said:

"It is contended that the court erred in not submitting to the jury the issue as to defendant's negligence. Undoubtedly, questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, *where the evidence is undisputed*, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 482; *Anderson County Commissioners v. Beal*, 113 U. S. 227, 241; *Schofield v. Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618. 'It would be an idle proceeding,' this court said in *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727, 733, 'to submit the evidence to the jury when they could justly find only in one way.'"

In the case of *Blakney v. Seattle Electric Co.*, 28 Wash. 607, 68 Pac. 1037, this court held that an inference would not be indulged which contradicted "unquestioned proof."

It is also contended that the submission of the case to the jury was justifiable on the doctrine of "the last clear chance." We do not think it applicable to this case. There was no evidence that those in charge of the locomotive had any reason to believe that the deceased was about to cross the track, until when within fifty feet thereof he began whipping his horses to get across. If they had seen him prior to that time, they would have been justified in believing that he would not attempt to cross the track so as to threaten a collision. In *Christensen v. Union Trunk Line*, *supra*, this court said:

"It was undoubtedly the duty of the motorman in charge of the car to use all reasonable precautions to prevent injury to the respondent, but it was not negligence on his part not to anticipate that the respondent, who was traveling on the public highway, in the same direction, and by the side of the railway track, would suddenly undertake to cross the track in front of the car. He had a right to presume that the respondent would remain off the track and not knowingly place himself, or his property, in imminent danger. And he was not bound to regulate his speed at such a rate as would certainly avoid injury to any one who might attempt to cross the road in an unreasonable and improper manner."

In the case of *Helber v. Spokane Street R. Co.*, 22 Wash. 319, 61 Pac. 40, this court, speaking by Dunbar, J., at page 322, used this language:

"The universal knowledge of this fact has established a custom, which ought in justice to have the force of law, making it the duty of the party who can more easily and readily adjust himself to the exigencies of the case to do so, and to stop or turn to avoid a collision; and the motorman has the right to presume that such duty will be performed."

In the case at bar, it was not shown that anything was done that precipitated, or omitted that could have avoided, the collision, after the discovery was made that deceased was attempting to cross. There was no evidence showing any negligence in this particular. It is contended that those in charge of the engine should have seen Mr. Woolf sooner and noticed that he was unmindful of the engine's approach, and should have stopped or checked their speed before it was too late. If it was negligence, imputable to the engine operatives, not to have sooner seen deceased, it was likewise negligence for him not to have seen the engine. He had as unobstructed a view as they. His hearing also should have apprised him of their approach. Certainly their negligence was no greater than his. Assuming, as

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we must, that they were negligent, it nevertheless appears conclusively that his negligence contributed proximately to the cause of the unfortunate calamity. The doctrine of "comparative negligence" does not obtain in this state. *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84.

But respondent's counsel argue, with ability and much ingenuity, that the question of contributory negligence was for the jury upon all of the evidence of the case; and that, having passed thereupon, its verdict should be conclusive upon the court. To this we cannot assent. There are many cases where the verdict of the jury is legally and properly conclusive. But where it clearly appears that the jury has disregarded both the evidence and the instructions of the court, its verdict should have no binding force. To uphold such verdicts is not only to do an injustice to the injured party, but tends to encourage unmeritorious litigation, to handicap litigants with meritorious cases, and to deprive our courts of that confidence and respect which should ever be maintained. There is no reason why a verdict should be respected when the record shows conclusively that it is not entitled to respect. Our law is no respecter of persons. The old and young, rich and poor, great and small, corporation and individual, are equally entitled to their rights before the law; and if they do not secure them, there is something wrong—not with the law, but with its administration. If a trial judge disregards the evidence and law in a given case, and makes a decision showing it to be the result of sympathy, bias, prejudice, or other improper consideration, the appellate court does not hesitate to review and reverse his action. We are aware of no reason why the same character of conduct and decision on the part of a jury should be any more sacred. It is doubtless true that most juries are conscientious and try to be fair and honest. The same is

true of most judges. But this constitutes no reason why the occasional unjust and illegal verdict of the one, or like decision of the other, should be permitted to stand. Juries are no more above the law than are judges or other officials or persons. This should be understood and recognized in the administration of justice. Every litigant, regardless of the class of litigation to which his case belongs, is entitled to a fair and impartial trial, and to have substantial justice meted out. Judges and juries are instruments of the law intended to guarantee such rights and bring about such results, so far as may be practicable. When that purpose is thwarted, either by outside influence or inward delinquencies, a wrong is done that should be corrected, if correction is possible. This court has frequently held that verdicts contrary to what all reasonable men ought to find upon the evidence, or obnoxious to conceded or undisputed facts, should not be permitted to stand. *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Oregon R. & Navigation Co. v. Egley*, 2 Wash. 409, 26 Pac. 973, 26 Am. St. 860; *French v. First Ave. R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Jennings v. Tacoma R. & M. Co.*, 7 Wash. 275, 34 Pac. 937; *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Olson v. McMurray etc. Co.*, 9 Wash. 500, 37 Pac. 679; *Blakney v. Seattle Electric Co.*, *supra*; *Hamlin v. Columbia etc. R. Co.*, *ante*, p. 448, 79 Pac. 991; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.

In the case of *Oregon R. & Nav. Co. v. Egley*, *supra*, this court, speaking by Dunbar, J., said:

"Where there is no conflict of testimony on material points, and there is no testimony tending to establish a

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fact, the establishment of which is necessary to warrant a verdict, the court will not hesitate to interfere in the interests of justice and reverse the judgment."

In the case of *McQuillan v. Seattle*, 10 Wash. 466, 38 Pac. 1120, 45 Am. St. 799, this court said:

"There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law, . . . The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined by law, and is the same under all circumstances. . . . And the second is where the facts are undisputed and but one reasonable inference can be drawn from them;" citing *Cooley on Torts*, 670-1; 2 *Thompson on Negligence*, §§ 1236-7.

In *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98, this court, speaking by Mount, J., said:

"It is true that questions of this kind are usually questions of fact for the jury, but, where the facts and circumstances surrounding the case are such that reasonable men could not reasonably and properly find negligence therefrom, then it is the duty of the court to order a nonsuit."

The argument that contributory negligence involves the question of what an ordinarily prudent man would do under all the circumstances and consequently presents a question solely for the jury, is, when applied to the case at bar, unsound in this: in railroad crossing cases the law has prescribed "looking and listening" as precautions essential to "ordinary care" or "ordinary prudence." Hence, as a matter of law, a man crossing a railway track without "looking and listening," cannot be held guiltless of negligence, except in rare cases under extraordinary conditions, none of which obtain in this case. But respondent's counsel say that the law does not fix the particular place where a person must "look and listen."

"The rule [that a party should look] contemplates that this should be done at a time and place when the reasons upon which it is founded should be effective. When the law requires steps of diligence and caution, it will not be satisfied by the substitution therefor of vain and useless acts." *Snider v. New Orleans etc. R. Co.* 48 La. Ann. 1, 18 South. 695.

When, therefore, the undisputed evidence and established physical facts show that at *any* point within one hundred feet of a crossing a person could see along the railway track for over six hundred feet, and did not do so, or, doing so, undertook to rush across ahead of a rapidly approaching engine, it is difficult to conceive of any theory exempting him from the charge of negligence.

Appellant's challenge to the sufficiency of the evidence, made at the close of the case, and its motion for judgment, should have been sustained. Aside from the preponderance of the evidence—which was clearly with the defendant—the undisputed evidence and established and conceded facts constituted a complete bar to respondent's recovery. The verdict of the jury did not change the situation.

The judgment of the honorable superior court is reversed, with instructions to dismiss the action.

MOUNT, C. J., DUNBAR, CROW, and RUDKIN, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

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Statement of Case.

[No. 5356. Decided March 17, 1905.]

J. P. SHOOK, *Appellant*, v. JOHN C. SEXTON *et al.*,
Respondents.¹

APPEAL AND ERROR—REVIEW—STIPULATION—EFFECT. A stipulation admitting the facts stated in the pleadings, and treated by the parties and court as sufficient to raise the validity of an ordinance, will be so considered on appeal.

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. The supreme court has jurisdiction of an appeal involving the validity of an ordinance, regardless of the amount in controversy.

ANIMALS—IMPOUNDING—MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—CONSTITUTIONAL LAW—DUE PROCESS OF LAW. Under Bal. Code, § 1011, a municipal corporation of the fourth class may prohibit the running at large of domestic animals, and an ordinance providing for the summary sale of impounded animals, under reasonable notice, without a judicial inquiry, is effective to transfer the title and does not authorize the taking of property without due process of law.

SAME—IMPOSING FINE. A provision in such an ordinance imposing a fine against an owner for permitting animals to run at large, to be exacted without a judicial investigation, is unconstitutional.

SAME—INVALIDITY OF ORDINANCE AS TO FINE NOT AFFECTING BALANCE OF IMPOUNDING ORDINANCE—SALE—VALIDITY—OFFER TO PAY LEGAL CHARGES. An invalid provision in an impounding ordinance whereby a fine is exacted from the owner, does not affect the validity of the other provision of the ordinance, otherwise complete in itself, prohibiting the running at large of domestic animals and providing for a summary sale, without judicial investigation, to pay said fine and the charges for the impounding, keeping, and sale; nor does such provision affect the validity of a sale, where the owner did not offer to pay the legal charges, before or after the sale.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered February 27, 1904, in favor of the defendants, upon stipulated facts, after a trial be-

¹Reported in 79 Pac. 1093.

fore the court without a jury in an action of replevin. Affirmed.

Wright & Wright, for appellant.

Myers & Warren, for respondents.

HADLEY, J.—This is an ordinary action in replevin for the recovery of a horse. The value is alleged at \$150. The defendants answered, alleging ownership and right to possession as purchasers at an impounding sale, made in pursuance of an ordinance of the town of Reardan, a municipal corporation of the fourth class in this state. A written stipulation in the record, signed by counsel for the respective parties, admits that the facts alleged in both the complaint and answer are true. The stipulation also contains the following:

“It is further stipulated that, if the court finds the ordinance set up in the answer to be valid, legal and constitutional, then judgment shall be entered for the defendant; but if the court finds that said ordinance is invalid, illegal and unconstitutional, then judgment shall be entered for the plaintiff.”

It might be argued from the above quotation that the parties were bound by the judgment of the trial court without further contest, but respondents do not urge that point, and, inasmuch as the parties and the trial court seem to have treated the stipulation as sufficient to submit the issue of the validity of the ordinance and without limitations as to further contest, we shall so regard it. The court held the ordinance to be valid, and entered judgment for the defendants. The plaintiff has appealed.

The amount in controversy is not within the jurisdiction of this court, but inasmuch as the validity of the ordinance was considered as in issue, this court has jurisdiction of the appeal, under § 4, art. 4, of the state consti-

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tution, and Bal. Code, § 4650, whereby jurisdiction is vested here without regard to the amount in controversy, when the validity of a statute is involved in the action.

The only question before us is that of the validity of the ordinance. We here set forth the ordinance in full.

"§ 1. That after the 31st day of May, 1903, it shall be unlawful for the owners thereof to permit any hogs, mules, horses or cattle to run at large within the corporate limits of the town of Reardan, and any person who shall permit any mules, horses or cattle to run at large contrary to the provisions of this section shall be fined in the sum of two dollars for each head of mules, horses or cattle so permitted to run at large; and any person who shall permit any hog to run at large contrary to the provisions of this section shall be fined in the sum of one dollar for each hog so permitted to run at large.

"§ 2. That it shall be the duty of the marshal to take up any hogs, mules, cattle or horses permitted to run at large in violation of this ordinance, and immediately post notices in three public places within the corporate limits of the town of Reardan, which notices shall give a description of the stock taken up and state that said stock, unless redeemed by the owner, will be offered for sale at public auction, stating the hour and the day when and the place where such sale shall occur. That such sale shall in no case occur in less than five days from the date of said notices, and that the owner shall have the right to redeem any stock taken up as hereinbefore provided, at any time prior to the date of said sale by paying the fine and the costs of keeping and feeding such stock. That if, at the time set for the said sale, said stock shall not have been redeemed, then the marshal shall proceed to offer said stock for sale to the highest bidder for cash, and he shall retain from the proceeds of such sale the cost of keeping and feeding said stock, the amount of the fine and 10 per cent of the amount of the proceeds of such sale, and the overplus, if any, to be deposited with the treasurer and kept by him for six months; provided, if the owner of the stock so sold shall at any time within the said six months, prove

his ownership of said stock then said overplus shall be paid over to said owner, but if no claim shall have been made for said overplus within said six months, then said overplus shall be accredited to the current expense fund, and all rights of redemption shall have expired. That in case there shall not be a reasonable sum bid for any stock advertised for sale hereinbefore provided, the marshal may at his option adjourn said sale and readvertise from time to time.

"§3. That the marshal shall retain as his compensation for the enforcement of the provisions of this ordinance, one-half of all fines which may be collected and 10 per cent of all sales made under the provisions of this ordinance. That any sum which may be retained as provided for in this ordinance, as costs for keeping and feeding stock, shall be applied by the marshal to the payment of such costs, and the marshal shall not allow unreasonable charges for such keeping and feeding. That one-half of all fines collected under the provisions of this ordinance shall be paid into the current expense fund."

It is urged by appellant that the ordinance is unconstitutional, in that it attempts to impose a fine on the owners of certain animals allowed to run at large, without a judicial investigation or an opportunity to show that a penalty has not been incurred. The legislature has conferred the following powers in the premises upon municipal corporations of the fourth class:

" . . . to regulate, restrain, or prohibit the running at large of any or all domestic animals within the city limits, or any part or parts thereof, and to regulate the keeping of such animals within any part of the city; to establish, maintain and regulate a common pound for estrays, and to appoint a pound keeper, who shall be paid out of the fines and fees imposed on, and collected from, the owners of any impounded stock." Bal. Code, §1011, subd. 10.

It will be seen that the power to impose a fine has been conferred by the legislature, but the question now is

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whether such fine may be imposed without a judicial investigation. Such ordinances as the above are upheld by many courts, so far as they relate to the summary sale of the animals without judicial inquiry, on failure to pay the expenses of impounding, keeping, notice and sale. It is held that the power to abate such nuisances as animals running at large is a police regulation, which necessarily includes the effective means for doing it, and that the summary sale method, under reasonable notice, is the most effective, since a judicial inquiry would cause delay and increased expense. This method must involve the transfer of title to the animal when sold. Otherwise it would be ineffective. But such a sale, under the terms of such an ordinance as the one now before us, does not work a forfeiture of the animal. In *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399, the court said of a similar ordinance:

"The ordinance does not, strictly speaking, declare or work a forfeiture of impounded animals, since it provides for the payment of the proceeds of the sale to the owner, after deducting the costs of the proceeding."

See, also *Gosselink v. Campbell*, 4 Iowa 296. There is some conflict among authorities, but such ordinances, so far as they relate to the transfer of title to animals, the application of the proceeds of the sale to the payment of expenses, and the payment of the surplus to the owner, after actual notice, or reasonable notice by posting or publication has been given, are held by the following authorities not to authorize a taking of property without due process of law: *Dillard v. Webb*, 55 Ala. 468; *Gilchrist v. Schmidling*, 12 Kan. 263; *Campau v. Langley*, 39 Mich. 451, 33 Am. Rep. 414; *Campbell v. Evans*, 45 N. Y. 356; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Crosby v. Warren*, 1 Rich. (S. C.) 385; *Mayor v. King*, 7 B. J. Lea (Tenn.) 441; *Paris v. Hale*, 13 Tex. Civ. App. 386, 35 S. W. 333.

It is held, however, that a fine imposed by such ordinances without an opportunity for judicial investigation, being in the nature of a punishment of the owner for permitting his animals to go at large, cannot be exacted without judicial investigation, inasmuch as it is a matter *in personam* and a personal liability. *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; *Gosselink v. Campbell*, *supra*; *Poppen v. Holmes*, 44 Ill. 360, 92 Am. Dec. 186. In *Wilcox v. Hemming* and in *Gosselink v. Campbell*, *supra*, the provision as to a fine was held invalid; but the ordinances, essentially the same as the one at bar, were in all other respects held to be constitutional and valid. This court has held that the unconstitutionality of a portion of a law does not affect the validity of other portions thereof, when the remaining portion is separable and complete in itself. *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 65 L. R. A. 336.

It should be so held here. The ordinance is complete and effective without the provision as to a fine. Under its terms a fine of \$2 was imposed which became an illegal charge without a judicial investigation. That fact does not, however, affect the judgment in this case. From the proceeds of respondents' purchase at the sale, the legal charges for the impounding, care and sale of the horse were paid. The record does not show that appellant ever offered before sale, or at all, to pay the legal charges. The title therefore passed to respondents under the sale. The amount paid at the sale was \$59, and what appellant may be entitled to recover from the surplus is a matter between him and the municipality, which holds the surplus for him subject to proof of ownership.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5277. Decided March 17, 1905.]

TRINITY PARISH OF SEATTLE, *Respondent*, v. AETNA
INDEMNITY COMPANY, *Appellant*.¹

INDEMNITY—BUILDING CONTRACT—BONDS—GUARANTY OF PERFORMANCE—BREACH—ACTION ON BOND BEFORE PAYING CLAIMS. Where an indemnity bond provides that the contractor shall faithfully perform all the terms of the contract, and the contractor, having finished the building, left the state without paying claims for labor and materials, the surety is liable immediately for the breach of the contract, and the owner may sue on the bond without first paying the claims or becoming obligated to do so by judgment.

SAME—NOTICE OF LOSS—WAIVER OF COMPLETION OF BUILDING. Where an indemnity bond guaranteeing a building contract provided for immediate notice to the surety of acts of the contractor involving a loss, the failure to give notice of the non-completion of the building on time, or extending the time for completion as provided for in the contract, is a waiver of damages for its non-completion on time, but not for unpaid bills, as the surety cannot complain of a breach of the contract waived by the owner which does not operate to the prejudice of the surety.

SAME—IMMEDIATE NOTICE—TEN DAYS. Where an indemnity bond guaranteeing a building contract provided for immediate notice to the surety of acts by the contractor involving a loss, and the contractor left the state without paying claims for labor and materials, notice of the unpaid claims, given within ten days after knowledge thereof by the owner, is a sufficient notice under the bond.

SAME—ACTION ON BOND BEFORE PAYMENT OF CLAIMS—ESTABLISHMENT OF CLAIMS—SUBROGATION OF AMOUNT DUE TO PRIMARY PAYMENT OF CLAIMS. In an action upon an indemnity bond guaranteeing the faithful performance of a building contract, to recover the amount of unpaid bills for labor and materials, in which the claimants for labor and materials are made parties and their claims established, it is proper to subrogate the amount due on the bond to the primary payment of the claims, where the surety was given an opportunity to contest the claims and failed to do so, since it became bound therefor to the extent of its liability on the bond.

¹Reported in 79 Pac. 1097.

Appeal from a judgment of the superior court for King county, Rudkin, J., entered January 21, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon an indemnity bond in the nature of specific performance. Affirmed.

Root, Palmer & Brown, for appellant, contended, among other things, that no action lies until the owner shows actual damages suffered by payment of the claims. *Central Trust Co. v. Louisville Trust Co.*, 87 Fed. 23; *Id.*, 100 Fed. 545; *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 60 N. E. 295, 83 Am. St. 745; *Wicker v. Hoppock*, 6 Wall. 94; *Hoy v. Hansborough*, 1 Freeman's Ch. (Miss.) 533; *M'Lean v. Ragsdale*, 31 Miss. 701; *Jeffers v. Johnson*, 21 N. J. L. 73; *Michigan St. Bank v. Hastings*, 1 Doug. (Mich.) 259; *Gregory v. Hartley*, 6 Neb. 356; *Wilson v. Smith*, 23 Iowa 252; *Gato v. Warrington*, 37 Fla. 542, 19 South. 883; *American Bldg. & Loan Ass'n v. Waleen*, 52 Minn. 23, 53 N. W. 867; *Campbell v. Rotering*, 42 Minn. 115, 43 N. W. 795, 6 L. R. A. 278; *Solary v. Webster*, 35 Fla. 363, 17 South. 646; *Jenckes v. Rice*, 119 Iowa 451, 93 N. W. 384; *Taylor v. Coon*, 79 Wis. 76, 48 N. W. 123; *Estate of Hill*, 67 Cal. 238, 7 Pac. 664; *Cochran v. Selling*, 36 Ore. 333, 59 Pac. 329; *Valentine v. Wheeler*, 122 Mass. 566, 23 Am. Rep. 404; *Tate v. Booe*, 9 Ind. 13; *Israel v. Reynolds*, 11 Ill. 218; *Miller v. Fries*, 66 N. J. L. 377, 49 Atl. 674; *Tompkins v. Floyd County etc. Ass'n.*, 19 Ind. 197; *Loyd v. Marvin*, 7 Blackf. (Ind.) 465. The failure to give immediate notice is fatal to the action, ten days not being a reasonable time, as a matter of law. *National Surety Co. v. Long*, 125 Fed. 887; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; *Ermen-*

trout v. Girard Fire & M. Ins. Co., 63 Minn. 305, 65 N. W. 635; *Whitehurst v. North Carolina Mut. Ins. Co.*, 7 Jones' Law 433, 78 Am. Dec. 246; *Underwood Veneer Co. v. London Guarantee etc. Co.*, 100 Wis. 378, 75 N. W. 996; *National Constr. Co. v. Travelers' Ins. Co.*, 176 Mass. 121, 57 N. E. 350; *Employers' Liability Assur. Corp. v. Light etc. Co.*, 28 Ind. App. 437, 63 N. E. 54; *Northwestern Tel. Ex. Co. v. Maryland Casualty Co.*, 86 Minn. 467, 90 N. W. 1110; *London Guarantee & Acc. Co. v. Siwy*, (Ind. App.) 66 N. E. 481; *Rooney v. Maryland Casualty Co.*, 184 Mass. 26, 67 N. E. 882; *Smith & Dove Mfg. Co. v. Travelers' Ins. Co.*, 171 Mass. 357, 50 N. E. 516; *Green v. Northwestern Live-Stock Ins. Co.*, 87 Iowa 358, 54 N. W. 349; *Foster v. Fidelity & Casualty Co.*, 99 Wis. 447, 75 N. W. 69; *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Parker v. Farmers' Fire Ins. Co.*, 179 Mass. 528, 61 N. E. 215; *Peabody v. Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; *Cook v. North British etc. Ins. Co.*, 183 Mass. 50, 66 N. E. 597; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 61 Am. St. 627; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898; *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; *La Force v. Williams City Fire Ins. Co.*, 43 Mo. 518; *Inman v. Western Fire Ins. Co.*, 12 Wend. 452; *California Sav. Bank v. American Surety Co.*, 87 Fed. 118.

Walter S. Fullon and Vince H. Faben, for respondent.

MOUNT, C. J.—On the 18th day of April, 1902, the respondent entered into a contract with N. H. Beer, by the terms of which contract said Beer was to furnish all the materials, and erect a church building in the city of

Seattle, in accordance with certain drawings and specifications, at an agreed price of \$25,800. The contract was in the usual form of builders' contracts as prepared by architects, and provided, among other things, that changes and alterations might be made in the work as it progressed; that the building should be completed on or before September 1, 1902, and for liquidated damages at the rate of \$5 per day for each day that the work should remain uncompleted after that date; and that the owner could, at any time, on default of the contractor, on two days' notice, assume the work and discharge the contractor. It also provided that, for each \$2,000 worth of work done, the contractor should receive seventy-five per cent of that amount, and, on completion and acceptance of the work, he should receive seventy-five per cent of the balance then due, and final payment within forty days after the contract was fulfilled. It also provided that the contractor should furnish a bond in the sum of \$7,500 for the faithful performance of the contract. This bond was furnished by the Aetna Indemnity Company, the appellant. This bond, after reciting the terms of the contract and specifications which were attached thereto, provided, among other things, as follows:

"The condition of the foregoing obligation is such that, if the said principal shall well, truly, and faithfully comply with all the terms, covenants, and conditions of said contract on his part to be kept and performed, according to its tenor, then this application shall be void; otherwise to remain in full force and effect: Provided, that the said surety shall be notified in writing of any act on the part of said principal, or his agent or employees, which may involve a loss for which the said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the fully authorized representative, . . . of the Trinity Parish, Provided, that if the said principal shall fail to comply with all the terms of said contract to such an extent that

the same shall be forfeited, then the said surety shall have the right and privilege to assume said contract and to sub-let or complete the same, . . . Provided further, that in the event of any breach of the conditions of this bond said surety shall be subrogated to all the rights and properties of said principal arising out of said contract, and all payments deferred, and any and all moneys and property at that time due said principal under and by virtue of said contract shall be credited upon claim which said Trinity Parish of Seattle will make upon said surety, . . . Provided further, that any suits at law or proceedings in equity brought against this bond to recover any claim hereunder must be instituted within six months after the first breach of said contract."

After the execution of the contract and bond, the contractor proceeded with the work. The building was not completed at the time designated, because, during the progress of the work, certain extras were furnished which had the effect to extend the time for the completion of the building. On January 3, 1903, respondent gave the appellant written notice of its intention to make the last partial payment, under the contract between respondent and said contractor, and the payment was subsequently made. The work was substantially completed on or about January 20, 1903, when the contractor quit the work and left the state. The respondent thereupon took possession of the building, and corrected some defective work at a cost of about \$150. At the time said Beer quit the work, he left a number of bills for materials unpaid. On January 30, 1903, soon after respondent learned of these unpaid bills, notice was given to appellant that the contractor had failed to pay for said materials and labor. At the time this action was begun, liens had been filed on the building for claims amounting to some \$1,500, but liens had not been filed for other claims amounting to about \$4,000. The action was brought in the nature of specific performance, and all the lien and other claimants were made par-

ties and required to set up and establish their claims. Judgment was entered substantially as prayed for against the bonding company. This appeal is from the judgment rendered against the appellant.

Appellant insists that neither the complaint nor the evidence is sufficient to establish a cause of action, because, at the time the action was begun, the respondent had paid no claims against the building and had, therefore, suffered no damages by the default of the contractor. The argument is based upon the contention that the bond given by the appellant was one of indemnity merely. Many authorities are cited to the effect that, when the undertaking is one of indemnity, there is no liability until the respondent has been damaged by reason of having actually paid out money, or become obligated by a judgment to do so. Conceding, without deciding, that this is the general rule, where the undertaking is indemnity, merely, to save the respondent harmless from loss of damages which he may sustain, we cannot agree to the contention that this bond is one to save the respondent harmless from loss of damages which he may sustain. It does that, to be sure, but it does more. It provides:

"If the said principal shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on his part to be kept and performed according to its tenor, then this obligation shall be void; otherwise to remain in full force and effect."

This, and other provisions quoted, clearly show that the bond is a guaranty that the contractor will perform his contract. When the contractor failed to perform his contract, the guarantor became immediately liable for the faithful performance of all its terms. This point was decided by this court in *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794. It is true that, in the *Friend* case, liens had been foreclosed and judgment rendered, but the failure

to pay for the materials was the breach of the contract which gave the right of action. The judgment of foreclosure simply established the amount of the liability. In speaking to this point, we said, at page 430:

"The covenant in the building contract on the part of the contractor with Mrs. Friend is as between them equivalent to a direct promise to pay for materials used in the construction of the building, and a breach of the contract occurred when the contractor suffered the obligation to become a charge on her property; at least, she was entitled to treat it as a breach. It may be true that she was not obliged to do so; that she could have waited until the lien had become fixed and determined by judgment against her property, and treated that as the breach of the bond, thus escaping the onus of establishing at the trial the validity of such lien and the amount of the indebtedness, but she was not obliged to delay action in that behalf. She could treat the failure of the contractors to keep her property free from such incumbrance as a breach of the contract."

In this case the respondent, for the same reason, could treat the failure of the contractor to pay for the labor and materials as a breach of the contract, as in fact it was, because such failure was a failure of the contractor to well, truly, and faithfully comply with all the terms, covenants, and conditions of said contract on his part to be kept and performed. We think, therefore, that the complaint stated a cause of action, and was not prematurely brought.

It is next claimed that the provision in the bond, to the effect that immediate written notice, of any act on the part of the principal which may involve loss, shall be given to the surety, is the essence of the bond, and that, since notice was not given until January 30, 1903, five months after the failure to complete the building in time, no recovery can now be had upon the bond. The court below held that the failure to notify the bonding company of the default in completing the building within the prescribed time was

a waiver of that item of damages prior to the notice; but that the notice of the unpaid claims for materials, given within ten days after knowledge by respondent, was sufficient for those items, and for loss occurring after that time. These rulings were clearly right. In *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052, we held that the surety cannot complain of any breach of the contract which the owner waives, that does not operate to his prejudice. See, also, *Ovington v. Aetna Indemnity Co.*, 36 Wash. 473, 78 Pac. 1021.

In this case the contract provided for damages at the rate of \$5 per day, if the buildings had not been completed on the 1st day of September, 1902. The contract also provided for an extension of the time, upon certain contingencies. The court found at the trial that the time was extended some forty-one days, and gave no damages for this time. The failure to immediately notify the surety company of the non-completion of the building by the contractor on time was, at most, a waiver of the claim for damages in that respect, but was not a waiver of the entire contract. *Ovington v. Aetna Indemnity Co.*, *supra*; *Heffernan v. United States Fidelity etc. Co.*, ante p. 477, 79 Pac. 1095.

The record discloses that Beer, the contractor, was actively engaged in the work until about the 20th of January, 1903. On that date, after drawing all the money due him upon the contract, except what was coming on final payment not then due, he suddenly left the state, and thereupon it was discovered that claims for labor and materials had not been paid. Within ten days after this time, the appellant was notified in writing of this defalcation. This was a sufficient notice within the meaning of the provision of the bond. *Remington v. Fidelity & Dep. Co.*, 27 Wash. 429, 67 Pac. 989.

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Syllabus.

The court, in its conclusions of law and decree, ordered the amount due the contractor from the respondent to be credited on the bond, and that the amount due on the bond should be applied in payment of the claims for labor and material established on the trial. If the bond in this case was a contract of guaranty, it follows that it was not error to subrogate the amount due on the bond to the primary payment of these claims. Appellant at the trial was given an opportunity to contest these claims, which it refused to do. It was, therefore, bound for the amount thereof to the extent of the liability on the bond.

There is no error in the record. The judgment is affirmed.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5467. Decided March 21, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
RUTLEDGE, *Appellant*.¹

CRIMINAL LAW—EVIDENCE—IDENTIFICATION—EXPERT EVIDENCE—OPINION OF POLICE OFFICER FROM DESCRIPTION—PERJURY. In a prosecution for perjury in having testified to an alibi for one F, charged with a certain robbery, the testimony of a police officer that, upon receiving a description of the guilty parties, he started out "to hunt for F and E, for the men that did the job," is inadmissible and prejudicial error, since it amounted to an expression of his opinion, from a mere description, that F was guilty of the robbery, making the accused guilty of the perjury charged, and the matter is not a proper subject of expert evidence.

SAME—PERJURY—TWO WITNESSES—CORROBORATION—INSTRUCTIONS. It is not error to refuse to instruct that no conviction could be had for perjury unless the falsity of the evidence was proved by two witnesses, or by one witness and corroborating

¹Reported in 79 Pac. 1123.

circumstances of equal weight and credibility as the testimony of another witness; since the rule is that the corroborating circumstances established by independent evidence need not equal in weight the testimony of a second witness, but need only be of such a character as to turn the scale and overcome the evidence of the defendant and the legal presumption of his innocence.

SAME—FACT OF MORE THAN ONE WITNESS. A refusal to instruct that there can be no conviction for perjury without the evidence of two witnesses, or one witness and corroborating circumstances, is not justified by the fact that there was more than one witness, since the jury is at liberty to disregard the evidence of any witness as unworthy of credence.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered April 1, 1904, upon a trial and conviction of the crime of perjury. **Reversed.**

Robertson, Miller & Rosenhaupt, for appellant.

Horace Kimball and R. M. Barnhart, for respondent.

RUDKIN, J.—About nine o'clock on the evening of April 4, 1903, one Miller was assaulted and robbed by three masked men, in his butcher shop, in the city of Spokane. An information was filed in the superior court of Spokane county against Frank Fair and Sam Eder, charging them with the commission of said crime. At the trial of Fair, the defendant Rutledge was a witness in his behalf, and as such witness, testified that he was in the town of Prosser, 186 miles from the city of Spokane, on the 4th day of April, 1903, and that he saw Fair in said town of Prosser, on the evening of said day, between the hours of nine and ten o'clock. Thereafter an information was filed in the same court against the defendant Rutledge, charging him with the crime of perjury, the perjury being assigned upon the testimony above set forth. The defendant was convicted and, from the judgment and sentence of the court, this appeal is taken.

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Opinion Per RUDKIN, J.

Numerous errors are assigned, on the rulings of the court sustaining objections to questions propounded to several of the jurors on their *voir dire* examination. The state insists that these rulings, with one or two minor exceptions, are not properly before us for review, and, inasmuch as the same questions may not arise on another trial, we will not consider them on this appeal. Numerous requests for instructions were also made by the appellant, and refused by the court. Some of these requests might properly have been granted; others were argumentative in form, and were properly denied. We think, however, that the law of the case was sufficiently covered in the general charge of the court, except in one particular to be hereafter noted.

On the trial of the case, the court, over the objection of the appellant, permitted Miller, the prosecuting witness at the former trial, to testify that he gave a description of the robbers to one McDermott, a police officer of the city of Spokane. McDermott was then called, and was permitted to testify, over the objection of the appellant, that he received a description of the robbers from Miller on the morning after the robbery. The following question was then asked: "Q. After getting this description, what did you do in the case?" An objection to this question was overruled, and the witness answered: "I started to hunt for Fair and Eder, for the men that did the job."

We think this testimony was clearly incompetent and prejudicial. It will be observed that the presence of Fair at the butcher shop, at the time of the robbery, was as important on this trial as on the trial for robbery, so far as the identification by the witness Miller was concerned. The only and apparent object of this testimony was to convey to the jury the impression that the description given by the witness Miller was so full and accurate that the police

officer immediately identified Fair and Eder as the robbers, and forthwith proceeded to apprehend them. The same result would have been accomplished had the prosecuting attorney asked the question: "From the description given by Miller, who, in your opinion, committed the robbery?" The incompetency of this evidence would seem apparent, and yet such was the effect, and the only effect, of the testimony received. Miller himself might express an opinion as to the identity of Fair,

" . . . mainly because the facts constituting similarity, or the reverse, in personal appearance are so numerous and peculiar that they cannot be specifically narrated so as to bring out clearly their proper force and significance before the jury. Hence a witness, after describing a person seen by him, may state that, in his opinion, it was the prisoner, or that he resembled the prisoner, under the rule permitting a non-expert witness to give his opinion where the jury would be unable, otherwise, to form an intelligent conception of identity." Underhill, *Crim. Evidence*, § 55.

This rule does not extend to testimony such as was given by the witness McDermott. The purport of the testimony of McDermott was that, from the description given him, he formed the opinion, or arrived at the conclusion, that Fair and Eder committed the robbery. This opinion or conclusion went before the jury over objection, and the ruling admitting it can only be sustained on the theory that McDermott was an expert witness. "An expert is a person who possesses peculiar skill and knowledge upon the subject-matter on which he is called to testify." Underhill, *Evidence*, § 185.

"Where the matter or transaction under consideration is such that all the facts can be intelligibly ascertained by men of average mental training or intelligence, where no peculiar skill, experience or knowledge is required to form an opinion—in other words, where the facts are such as come

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Opinion Per RUDKIN, J.

within the knowledge, observation and judgment of ordinary men—opinion evidence is not admissible.” *Id.*, § 186.

We think that to permit police officers and others to identify persons accused of crime, from mere general descriptions they may have received, would be dangerous in the extreme, and we are not prepared to sanction the practice.

The appellant requested two instructions, the substance of which is embodied in the following:

“You must be satisfied that the defendant wilfully, knowingly and corruptly swore falsely, and you must be so satisfied from the testimony of two witnesses, or from the testimony of one witness, and corroborating circumstances of equal weight and credibility as if the testimony of another witness to the same effect was produced.”

These requests were not technically correct, for two reasons: First, the corroboration need only extend to the falsity of the testimony upon which the perjury is assigned; and second, under the modern rule, the corroboration need not equal in weight the testimony of a second witness.

“According to the earlier cases no conviction of perjury could be had unless the falsity of the evidence given under oath was proved by the direct evidence of two credible witnesses, the evidence of the second witness being required to overcome the presumption of innocence which the law indulged in favor of the accused. Such is not now the law. The accused may be convicted on the evidence of one witness, which, however, must in all cases be corroborated. The corroboration need not be equivalent or tantamount to another witness. But it must be clear and positive and so strong that, with the evidence of the witness who testifies directly to the falsity of the defendant’s testimony, it will convince the jury beyond a reasonable doubt.” Underhill, *Crim. Evidence*, § 468.

See, also, Wharton, *Crim. Evidence* (9th ed.), § 387. The modern rule is thus stated in an instruction approved by

the supreme court of California, in *People v. Rodley*, 131 Cal. 240, 63 Pac. 351:

"There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted."

This, we think, is a correct statement of the modern rule of evidence, as applied to the crime of perjury. The respondent concedes the principle of law embodied in the foregoing request, but claims it was not error to refuse such request in this case, for the reason that there was in fact more than one witness, and cites *Montgomery v. State*, (Tex. Cr. App.) 40 S. W. 805, from Texas, as sustaining this contention. The case cited does not sustain the doctrine contended for. On the contrary, the courts of Texas have held, in numerous cases, that the omission to instruct the jury that a conviction of perjury cannot be had on the testimony of a single witness is reversible error. *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. 180, and cases cited. The Texas statute required the court in all felony cases to distinctly set forth the law applicable to the case, whether asked or not; and we are not called upon to decide whether it would be error in this state to fail to give such instruction, in the absence of a request. The mere fact that there was more than one witness would not justify the court in refusing to give the instruction, as the jury are always at liberty to disregard the testimony of a witness or witnesses whenever they deem it unworthy of credence. We make these observations in view of a retrial of the case. It was not error to refuse to give the above instruction as requested, and we are not called upon

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Opinion Per HADLEY, J.

to decide in this case whether it was incumbent upon the court to give a correct instruction on the principle of law involved, of its own motion.

For the error in the admission of testimony, the judgment is reversed, and a new trial ordered.

MOUNT, C. J., DUNBAR, ROOT, and CROW, JJ., concur.
HADLEY and FULLERTON, JJ., took no part.

[No. 5172. Decided March 22, 1905.]

GEORGE PEDIGO, *Respondent*, v. ANNIE L. FULLER,
et al., *Appellants*.¹

TAXATION—APPEAL—TIME FOR TAKING IN TAX LIEN FORECLOSURE PROCEEDINGS—VACATION OF JUDGMENT. An appeal from an order denying a motion to vacate a tax foreclosure judgment must be taken within thirty days (Fullerton, J., dissenting).

APPEAL AND ERROR—TIME FOR TAKING—EXTENDING BY PETITION FOR RECONSIDERATION. Where a motion to vacate a judgment is denied the time for taking an appeal from the order cannot be extended by the filing of a petition to reconsider the order of denial, and the taking of an appeal from an order refusing to grant the reconsideration.

Appeal from orders of the superior court for King county, Hatch, J., entered July 14, 1903, and September 26, 1903, denying defendants' motions to vacate a judgment and to reconsider the former ruling. Appeal dismissed.

Palmer & Thomas, for appellants.

Sachs & Hale, for respondent.

HADLEY, J.—This is an action foreclosing a general tax lien. Judgment by default was entered August 31, 1900. Nearly three years afterwards, on June 8, 1903, certain

¹Reported in 79 Pac. 1129.

of the defendants filed a motion to vacate the order of default and the judgment. The motion was denied on July 14, 1903. Thereafter, on September 22, of the same year, said defendants filed a so-called petition for a reconsideration of the order denying the motion to vacate. The court refused to grant the petition on September 26. Thereafter on October 9, said defendants served notice of appeal from the order of July 14, and also from the order of September 26, refusing to reconsider the first order. Respondent moves to dismiss the appeal, for the reason that it was not taken in time.

It will be seen that, when the appeal was taken, more than thirty days had elapsed since the entry of the order denying the motion to vacate. This being a tax foreclosure proceeding, the point raised is the same as that considered by this court in *Brown v. Davis*, 36 Wash. 135, 78 Pac. 779. We there held that an appeal from an order denying a motion to vacate a tax foreclosure judgment is governed, as to the time of taking it, by the provisions of the revenue statute, and must be taken within thirty days. The same rule applies here unless, for reasons hereinafter stated, this case should be distinguished from the one cited.

It will be remembered that, some time after the entry of the order denying the motion to vacate, a petition for the reconsideration of that order was presented and denied. Did the petition and last order have the effect to enlarge the time for appeal from the order denying the vacation? We think not. The petition for reconsideration was an effort to get the court to vacate the order by which it denied the vacation of the judgment. A decision upon the petition involved the same legal questions that were decided upon the motion to vacate. The proceeding by the petition for reconsideration is unknown to our practice, so far as we are informed. If such a proceeding could have the effect to enlarge the time for appeal from such an order,

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Opinion Per Curiam.

then another petition to reconsider the denial of the first one could be presented, with still others to follow. Thus the time for appeal could be indefinitely extended. Such cannot be the law. The time for appeal began to run when the order denying the vacation of the judgment was made, and it was not extended by the subsequent proceedings.

For the foregoing reasons the appeal is dismissed.

MOUNT, C. J., DUNBAR, ROOT, RUDKIN, and CROW, JJ., concur.

FULLERTON, J. (dissenting).—The appeal was taken within ninety days from the entry of the order overruling the motion to vacate, and was, as I read the statute, within time. The case should have been heard upon its merits.

[No. 5351. Decided March 22, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Raine A. Small, Appellant*, v. THOMAS C. FLEMING *et al.*,
*Respondents.*¹

APPEAL—APPEALABLE ORDERS. An order sustaining a demurrer is not appealable.

Appeal from an order of the superior court for Snohomish county, Denney, J., entered February 13, 1904, sustaining a demurrer to a complaint. Dismissed.

Merrick & Mills, for appellant.

Robert A. Hulbert, for respondents.

PER CURIAM.—The respondents move to dismiss the appeal in this case upon the ground that the same is taken or sought to be taken from an order sustaining a demurrer

¹Reported in 79 Pac. 1115.

to appellant's complaint. This court has repeatedly held that such an order is not appealable. *Potvin v. McCorvey*, 1 Wash. 389, 25 Pac. 330; *Olsen v. Newton*, 3 Wash. 429, 30 Pac. 450; *Mason County v. Dunbar*, 10 Wash. 163, 38 Pac. 1003; *Padley v. Gregg*, 26 Wash. 322, 67 Pac 72.

The motion must be granted, and the appeal is hereby dismissed.

[No. 5402. Decided March 22, 1905.]

J. E. LILLY, *Respondent*, v. OLUF EKLUND *et al.*,
Appellants.¹

APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY. A general exception to all the findings of fact is insufficient unless it appears that each and all are erroneous.

SAME—STRIKING STATEMENT—REVIEW OF ERROR IN EXCLUDING EVIDENCE. Failure to except to the findings of fact in an equity case, while a valid objection to the consideration of the facts, is not ground for striking the statement, where error is assigned on the action of the trial court in excluding evidence that might have changed the character of the findings.

APPEAL—NONSUIT—WAIVER OF ERROR BY PROCEEDING WITH EQUITY TRIAL. In an equity case, the defendant, by proceeding with the trial, waives error in the overruling of a motion for a nonsuit or dismissal at the close of plaintiff's case.

EVIDENCE—ACTION TO QUIET TITLE—JUDGMENT—RES ADJUDICATA AS TO INDEBTEDNESS OF DEFENDANT. In an action to quiet title to lands sold under a judgment against the defendants, evidence that the defendants were not indebted, at the time the judgment was entered, is inadmissible, where it appears that the judgment was duly entered after personal service, since the judgment was *res adjudicata*.

APPEAL—EVIDENCE—HARMLESS ERROR. It is not prejudicial error to exclude evidence in rebuttal, where the fact offered in evidence is admitted by counsel in open court.

¹Reported in 79 Pac. 1107.

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Opinion Per Root, J.

SAME. Where the findings in an equity case are not excepted to, error cannot be predicated on the exclusion of evidence that would not have made any material change in the findings of the court.

Appeal from a judgment of the superior court for Kitsap county, Denney, J., entered May 4, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, quieting the title to real estate. Affirmed.

Revelle & Revelle, for appellants.

Charles A. Riddle, for respondent.

ROOT, J.—This was an action to quiet title, and resulted in a decree in favor of the respondent. The trial court made and filed separate findings of fact and conclusions of law. The only exception shown to have been taken to the findings is found in a minute in the clerk's docket, as follows:

"Plaintiff, by his attorney, C. A. Riddle, now files findings of fact and conclusions of law and decree herein, to which defendants Oluf Eklund and Pauline Eklund, his wife, by their attorneys, Revelle & Revelle, except, and request thirty days from May 4, 1904, in which to file statement of facts. Allowed by the court."

This court has repeatedly held that exceptions taken in this manner are insufficient under the statute, and that they will not be considered except when it appears that each and all of the findings are erroneous. It is not contended that all are so in this case. Respondent, in his brief, objects to the consideration of the statement of facts filed herein, and moves to strike said statement and affirm the judgment, for the reason that appellants have not made or taken any proper or sufficient legal exceptions to the findings of fact, and that there is no basis for an appeal. Appellants urge that, inasmuch as findings are not required to be made and filed in equity cases, the taking of excep-

tions thereto when made is unnecessary. It is true that the statute does not require findings to be made or filed in equity proceedings; but where findings are made by the trial court this court has held that exceptions must be taken to them and taken in a proper manner. See *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815, and cases therein cited. Frequently where exceptions were not properly taken to the findings, this court, upon motion, has stricken the statement of facts. However, in the case of *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636, the court declined to strike the statement of facts, but held that the motion should be regarded as an objection to the consideration of the facts embodied in the statement. The case of *Schlottfeldt v. Bull*, 17 Wash. 7, 48 Pac. 343, announced the rule that, where exceptions were not properly taken to the findings of fact, this court would not strike the statement of facts, when it appeared that some of the errors relied upon on the appeal were based upon the action of the lower court in excluding evidence. We think this rule is the correct one. Findings of fact, regarded with reference to the evidence admitted and existing in the case, might be perfectly proper and right, whereas the evidence excluded might, if admitted and considered, have changed the character of such findings. Consequently a litigant, by not excepting to findings which are right so far as the evidence admitted is concerned, is not and should not be thereby estopped from having this court review the action of the trial judge in excluding evidence offered by him. The motion to strike the statement of facts will be denied; but the objections to its consideration will be sustained as to everything therein contained, excepting those portions that have to do solely with the action of the court in excluding evidence offered by appellants.

Appellants also urge that they are entitled to have this court review the action of the trial court in denying their

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Opinion Per Root, J.

motion for a nonsuit, made at the close of plaintiff's case. Strictly speaking, a nonsuit has no place in an equity proceeding; but, treating the motion therefor as a motion to dismiss, we are not authorized to review the trial court's action in denying said motion. Former decisions of this court are adverse to appellants' contention. See, *Cattell v. Fergusson*, 3 Wash. 541, 28 Pac. 750, and *Scoland v. Scoland*, 4 Wash. 118, 29 Pac. 930.

Being unable to consider the question of the nonsuit, we are left to examine solely those rulings where appellants tendered evidence which the trial court excluded. One instance of this was where appellants offered to prove that they were not indebted to the Columbia & Puget Sound Railway Company, at the time they were sued by said company—the judgment in said suit being the one upon which the property involved in this case was subsequently sold, and through which proceeding respondent claims title. If this evidence had been admitted, it could not have changed the result. There are findings (not excepted to) that the action just mentioned was commenced by the filing of a complaint and service of summons and complaint upon both of appellants personally; that they defaulted; that trial was had, verdict rendered, and judgment duly entered against appellants; that, upon said judgment, execution issued and the property in question sold to Edgar Whipple and Amelia Whipple; that the sale was duly confirmed; and that appropriate proceedings were thereafter had by which the title was passed from the Whipples to respondent. Hence, it will be seen that the question of whether or not appellants owed the railway company anything at the time of the commencement of that action must be treated as *res adjudicata*. As the evidence, if admitted, could avail nothing, appellants are not prejudiced by its absence.

Appellants also excepted to the action of the court in ex-

cluding their evidence offered in rebuttal of the deposition of a witness named Stone. It appears that, when this evidence was tendered, it was objected to as bearing upon a subject which had been covered by appellants in their case in chief. However, the attorneys on the other side, in open court, admitted that these witnesses, whose evidence was offered to deny certain matters, would so deny them, and we cannot see that appellants were in any way prejudiced. It is also contended that the evidence of witnesses Johnson, Eklund, and Williams, as to the nearest way to log off the land in question should not have been excluded. Neither the materiality nor importance of this tendered evidence is apparent; and, if material, we are unable to see wherein it could in any manner have changed the findings which the court made. In fact, we are unable to see how any of the evidence excluded could, if admitted, have made any material change in the findings of the court as made and filed. This being true, the exclusion of such evidence did not prejudice appellants' rights. The only question remaining is as to whether or not these findings and conclusions thereupon justify and sustain the decree which was rendered. This does not seem to be seriously questioned. The findings clearly justify the decree.

The judgment and decree of the trial court is affirmed.

MOUNT, C. J., DUNBAR, CROW, and RUDKIN, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

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Citations of Counsel.

37	537
42	480
42	481

[No. 5206. Decided March 22, 1905.]

THOMAS J. CLARK, *Respondent*, v. GREAT NORTHERN
RAILWAY COMPANY *et al.*, *Appellants*.¹

CARRIERS—REMOVAL OF TRESPASSERS FROM TRAIN—FORCE NECESSARY—RESISTANCE. In removing trespassers from a train, the employees may use such force as appears reasonably necessary, and where forcible resistance is offered, the jury should not weigh with too much nicety the force resorted to.

NEW TRIAL—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—EXERCISE OF DISCRETION BY TRIAL JUDGE. When the trial judge is satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done, it is his duty to grant a new trial, the rules governing the trial and appellate courts being wholly different; and where the trial judge denies a new trial after expressing an opinion at variance with the ruling, he fails to properly exercise his discretion, and the ruling will be reversed on appeal.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered January 14, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the use of unnecessary force in removing the plaintiff from a train. Reversed.

M. J. Gordon and *C. A. Murray*, for appellants, contended, among other things, that damages for removing a trespasser from a train cannot be recovered unless the force used was excessive to a degree indicating wanton, wilful or reckless conduct. *Atchison etc. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. 780; *Atchison, Topeka etc. R. Co. v. Brown*, 2 Kan. App. 604, 42 Pac. 588; *Hall v. Memphis etc. R. Co.*, 15 Fed. 57; *Thompson, Negligence*, §§ 3307, 3308, 3216; *Illinois Cent. R. Co. v. King*, 13 Am. & Eng. R. R. Cases (New Series) 829; *Handley v. Missouri Pac. R. Co.*, 61 Kan. 237, 59 Pac. 271; *Fetter*,

¹Reported in 79 Pac. 1108.

Carriers of Passengers, § 240; *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 59 N. E. 794, 82 Am. St. 460, 52 L. R. A. 626; *Moore v. Columbia etc. R. Co.*, 38 S. C. 1, 16 S. E. 781; 4 *Rapalje & Mack's Digest Railway Law*, p. 197.

Merritt & Merritt and *Barnes & Latimer*, for respondent, to the point that the defendants were liable for the use of unnecessary force, cited: *Wright v. Cal. Cent. R. Co.*, 78 Cal. 360, 20 Pac. 740; *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464, 27 Am. Rep. 255; *North Chicago City R. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481; *Gallena v. Hot Springs R.*, 13 Fed. 116; *McClure v. Philadelphia etc. R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *Haver v. Central R. Co.*, 64 N. J. L. 312, 45 Atl. 593; *Moore v. Columbia etc. R. Co.*, 38 S. C. 1, 16 S. E. 781; *Western etc. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Biddle v. Hestonville etc. R. Co.*, 112 Pa. St. 551, 4 Atl. 485; *St. Louis etc. R. Co. v. Osborn*, 67 Ark. 399, 55 S. W. 142; *Lake etc. R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *Haman v. Omaha Horse R. Co.*, 35 Neb. 74, 52 N. W. 830; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286; *Citizens' St. R. Co. v. Willoeby*, 134 Ind. 563, 33 N. E. 627; *Chicago St. etc. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Peck v. New York etc. R. Co.*, 70 N. Y. 587.

PER CURIAM.—This case was before this court on a former appeal. The opinion will be found in 31 Wash. at page 658, 72 Pac. 477. In addition to the statement of facts contained in the former opinion, we deem it sufficient to say that the plaintiff was a trespasser on the Great Northern train out of Spokane, and refused to leave the train at the request of the conductor in charge, who is one of the defendants in this action. The plaintiff was forcibly ejected from the train at Hilliard, in Spokane county,

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and brought this action against the railway company and its conductor to recover damages for injuries received at the time of his expulsion.

Only two questions are presented by the pleadings; one, the question of excessive force used in ejecting the plaintiff from the train; the other, the amount of damages sustained. The plaintiff had judgment below and defendants appeal. All the errors assigned relate to instructions given, or requested instructions refused, and to the refusal of the court to grant a new trial. It was conceded at the trial that the respondent was a trespasser on the train, and offered resistance to his removal. Under these circumstances, the appellants requested the court to charge the jury that they would only be liable in case of palpable and perfectly apparent use of force, beyond that which was necessary to be used in overcoming the resistance offered by the respondent, and that there could be no recovery for injuries received except such as were wilfully, wantonly, or maliciously inflicted. On the other hand, the court instructed the jury that the appellants were liable for the use of force beyond that which was necessary to be used in overcoming the resistance offered by the respondent, and that the appellants were not liable for injuries received except such as were the result of the use of excessive force. The true rule is that, in removing trespassers from a train, the employees of the company may use such force as appears reasonably necessary, under all the circumstances, to accomplish the end in view; and, if the trespasser offers forcible resistance, a jury should not weigh with too much nicety the degree of force resorted to. We think the instructions given in this case fairly come within the above rule, but, inasmuch as the judgment must be reversed on other grounds, it is unnecessary to comment further on the instructions, as the same questions will not arise again.

In passing upon the motion for a new trial, the court below used the following language:

"I am compelled, though reluctantly, to deny the motion for a new trial in this case. My reluctance arises from the fact that, in my opinion, the weight of the evidence did not sustain the contention that excessive force was used in ejecting plaintiff from the train; but that issue was submitted to the jury, and was decided in favor of the plaintiff, and as, under our judicial system, the trial judge in a civil jury case has little more power or authority than a 'mentor at a town meeting,' I am not at liberty to disturb the jury's finding on that issue."

It appears from the foregoing statement that the trial court labored under an entire misapprehension as to its powers and its duties. Our statute provides that a new trial may be granted, among other grounds, for insufficiency of the evidence to justify the verdict; and this power must be exercised by the trial courts, if at all. These courts should take due care not to invade the legitimate province of the jury, but if, after giving full consideration to the testimony in the light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done between the parties, it is his duty to set the verdict aside. In *Kansas Pac. R. Co. v. Kunkel*, 17 Kan. 172, Mr. Justice Brewer, says:

"The judge has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside."

In *Reid v. Piedmont etc. Life Ins. Co.*, 58 Mo. 421, the court says:

"Where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight

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of the evidence, it should never hesitate in exercising the power and giving the aggrieved party a new trial."

In *Dickey v. Davis*, 39 Cal. 565, the court says:

"If the judge is not satisfied with the verdict and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony."

In *Kansas City etc. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 109, the court says:

"When the judgment of the trial judge tells him the verdict is wrong, whether from mistake or prejudice or other cause, no duty is more imperative than that of setting it aside, and remanding the questions at issue to another jury. While the case is before the jury for their consideration the jury are the exclusive judges of all questions of fact; but when the matter comes before the court, upon a motion for a new trial, it then becomes the duty of the trial judge to determine whether the verdict is erroneous. He must be controlled by his own judgment, and not by that of the jury."

In *State v. Billings*, 81 Iowa 99, 46 N. W. 862, the court says:

"To a valid judgment the law requires, first, that there shall be a verdict upon evidence to satisfy the minds of the jury, beyond a reasonable doubt; and, second, that the judge who presides at the trial shall believe that the evidence is sufficient to justify the finding."

In *Kansas City etc. R. Co. v. Ryan*, *supra*, in disposing of a motion for new trial, the trial judge, among other things, stated "that the verdict did not meet the approval of his judgment," that it was "largely in excess of what would be full compensation to the owner of the land," that he would "stand out of the way," and then overruled the motion. In passing upon such ruling, the appellate court said:

"In the case at bar the opinion of the trial judge is preserved in the case made; therefore it is properly here for

our consideration. This court has the right to ascertain from a record made up and certified to in due form whether the verdict of the jury has the approval of the trial judge. He has the same opportunity to see and hear the witnesses as the jury; and if, in his judgment, the jury have erred, it is proper, in disposing of a motion for a new trial, for the trial judge to so state. If he disapproves the verdict in as strong language as quoted, this court, having that knowledge from the record, will not hesitate to reverse the judgment and grant a new trial."

In *Miller v. Dumon*, 24 Wash. 648 64 Pac. 804, this court says:

"Generally, where the record discloses that the trial court has expressed the opinion that the verdict is not sustained by the evidence, or is contrary to the weight of the evidence and refuses to grant a new trial, the appellate court will reverse the judgment for an abuse of discretion (*Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738, and cases cited); but it must appear that the trial judge had this opinion; it must appear that he believed that the verdict was clearly against the weight of the evidence."

The numerous cases cited by the respondent from this court are not in point. The rules governing trial courts and appellate courts in this regard are wholly different. The distinction is clearly pointed out in the case of *Dewey v. Chicago etc. R. Co.*, 31 Iowa 373. where the following language is used:

"We therefore avail ourselves of this occasion to correct what we understand to be a very general misapprehension on the part of district and circuit judges in respect to the rule as to new trials in the *nisi prius* courts. This court has repeatedly declared the rule for itself (and such is the rule in most appellate tribunals), that where the evidence is conflicting and the *nisi prius* court has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, that we will not interfere. And this because, first, the jury have found the verdict and given credit to

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the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses, and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions, but generally only the substance of their testimony and often in the language of the attorneys interested in the cause. A mention of these considerations upon which the rule for the appellate courts is (in part) founded, is sufficient to show that the rule ought not and does not have any application whatever to the *nisi prius* courts. Those courts ought to independently exercise their power, to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted."

For the foregoing reasons, we think the trial court erred in two respects in denying the motion for a new trial: First, because it expressed an opinion at variance with its ruling; and second, because it failed to properly exercise the power and discretion vested in it. Numerous affidavits and counter affidavits were filed tending to show misconduct on the part of the jury, and the reverse. These questions will not arise on a new trial, and the court will not consider them. For the error in denying the motion for a new trial, the judgment is reversed and a new trial granted.

[No. 5085. Decided March 22, 1905.]

JOHN KROEGER, *Respondent*, v. THE SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

CARRIERS—PASSENGER ENTERING CAR BARN—IMPROPER PLACE TO TAKE CAR—NEGLIGENCE—FAULTY CONSTRUCTION OF BARN. / A street railway company is not a common carrier as to cars housed in its car barn over night for the purpose of repairs and cleaning, although four to six people on an average entered the barn every morning between the hours of 5 and 6 A. M., for their own convenience, without invitation, for the purpose of waiting for and taking the first car to distant points; and hence is not liable to passengers for injuries resulting from the faulty construction of the barn, there being nothing in the place to mislead or induce one to believe that it was a proper place to take a car, and all the surroundings indicating the purpose for which the barn was constructed and used. /

SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER—ENDEAVOR TO ENTER CAR AT IMPROPER PLACE. Where a passenger enters a car barn at an unusual and dangerous place to enter a car, and, after the signal to start the car is given, undertakes to enter the front entrance of the car when it is only three or four feet from the barn door, in a passage way so narrow that he would inevitably be caught and crushed between the car and door unless he succeeded in making the entrance before it reached the door, and where he had better opportunity than any one else of observing the dangers, he is, as a matter of law, guilty of contributory negligence which was the proximate cause of his injury, and it is error to fail to so instruct the jury.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 23, 1903, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in attempting to enter a street car. Reversed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Morris & Southard and *Benson & Hall*, for respondent.

¹Reported in 79 Pac. 1115.

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PER CURIAM.—For some time prior to the 18th day of April, 1902, the defendant was engaged in operating a street railway system in the city of Seattle and vicinity. In connection with its railway system, the defendant maintained a car barn at the corner of Fifth avenue and Pine street, which was used for the purpose of housing, cleaning and repairing its cars during the night, when not in service. The middle or new barn, where the accident which gave rise to this controversy happened, is sixty feet wide and one hundred eighty feet deep, facing on Fifth avenue. There were five tracks running from Fifth avenue into this barn, and extending substantially its entire length. For a distance of about eight feet from the side walk on Fifth avenue the floor of the barn was on a level with the sidewalk. From this point, about eight feet back of the street line, to a point 122 feet back from the street line, the cement floor of the barn was constructed about four feet below the threshold of the barn and the street level. Trestles were constructed across this space, which supported the tracks, thus leaving open pits below, so that the running gear and dynamos of the cars might be inspected and repaired from beneath the cars. Between the tracks, extending through the barn, plank walks were laid, to enable the barn men to pass between the tracks from car to car, with sand and other supplies, and to facilitate the work of inspection and repair. In the rear of the barn, and back of the pits above described, the floor again rose to the level of the tracks, and here were maintained derricks and other heavy machinery used in lifting the cars, when trucks or dynamos were in need of repair.

From fifteen to twenty-five cars were usually housed in this barn each night. These cars were shifted about from time to time during the night and in the early morning hours, for the purpose of repairs, and also for the purpose of placing in the front of the barn the cars first due to leave in the morning. There was a "No admittance"

sign on one of the trusses above the tracks in the barn, and the employees were instructed not to receive or discharge passengers in the barn. This rule was not strictly enforced, as will hereafter appear. At the front of the barn were cast-iron columns, on each side of the several tracks, to support the brick work in the front part of the building. Doors, attached to each of these columns and to the side walls of the building, opened and closed over the tracks. These doors were nearly always open, except in case of emergency. The iron columns to which the doors were hung were less than eleven feet apart, and did not leave sufficient space for a person to pass in safety between a car and the door.

The first regular car to leave this barn in the morning was the car for Green Lake, which left the barn at 5:15 A. M. For some considerable time prior to the 18th day of April, 1902, a number of persons were in the habit of going to this barn, for the purpose of taking this first car to Green Lake and other points distant from the city. From the testimony it would seem that from four to six persons, on an average, took the first Green Lake car every morning. A majority of these were police officers, who went off duty at 4:00 o'clock in the morning, and took this first car to reach their homes. The few civilians who took the car were usually persons employed on the city streets or elsewhere during the night, and took the car for the same purpose. These people would reach the car barn some time before the car was due to leave, and would enter the barn and take their seats in the car there to rest, read the paper, or sleep, as they saw fit. So far as the testimony discloses, no person, other than employees, was invited into the barn, and none of the above mentioned persons were forbidden to enter it. The employees of the company were about the barn in the discharge of their duties, cleaning, inspecting, and repairing the cars, and would sometimes, upon inquiry, direct persons entering the barn

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which car to take to reach a given destination. Nearly all the persons who were witnesses at the trial testified that they entered the barn and took the car there for their own convenience, rather than wait for the car to come from the barn.

The plaintiff in this action was employed on the city streets during the night of the 17th day of April, 1902, and for some time prior to that date. He quit work at 5:00 o'clock on the morning of the 18th, and went to this car barn, to take the first Green Lake car to his home at Fremont, as he had done perhaps a dozen times before. When he reached the car barn on the morning in question, the Green Lake car was standing on the track, almost ready to start, the front of the car being about even with the front of the barn, leaving the entrance at the front of the car not to exceed from two to four feet distant from the barn door. When all was in readiness, the motorman and conductor gave the usual signals to start, the car moved forward, the plaintiff attempted to enter through the front door or entrance of the car, and was caught and crushed between the car and the barn door. While there is some slight conflict in the testimony on minor points, and some testimony of a negative character inconsistent with the above statement, the foregoing facts are so clearly established by the testimony as to leave no question of fact for a jury to pass upon. The plaintiff brought this action to recover damages for the injuries thus received, and from a judgment in his favor this appeal is taken.

Two grounds of negligence are alleged in the complaint: First, negligence in the construction and maintenance of the car barn; and second, negligence in the operation of the car by which the respondent was injured. The answer is, in effect, a general denial, and a plea of contributory negligence.

The car barn in question was constructed and maintained for the sole purpose of housing, inspecting, cleaning, and repairing the cars of the appellant company, and the plan of construction in no manner affected or concerned passengers or prospective passengers, so long as the barn was used for the private purposes for which it was built. We cannot think that the limited use made of this barn by the few persons mentioned, at the times and under the circumstances stated, had the effect to transform this place from a car barn and work shop into a passenger station or depot. There was nothing about the place to mislead one, or to induce one to believe that the barn was a proper place for passengers to enter cars for rest or for sleep. When a majority of those persons entered the barn to take the car, the car was standing on trestles, over a pit, without a crew, and it would be going entirely too far to hold that the appellant was a common carrier of passengers in relation to a car so situate. All persons who entered this barn to take cars did so between the hours of 5:00 and 6:00 o'clock in the morning. They adopted this practice for their own comfort and convenience. All their surroundings indicated to them, clearly and fully, the purpose for which the barn was constructed and used, and the dangers incident to taking the cars at that place. Considering all these facts, and more especially the class of persons who thus entered the barn in violation of the rules of the company, even conceding such rules to have been unknown to them, we have no hesitancy in saying that the appellant was not a common carrier of passengers in this barn, and was not responsible for injuries resulting to passengers from faulty construction of the barn.

Were the employees in charge of the car negligent in its operation, and was the respondent guilty of contributory negligence? Ordinarily these are questions of fact for a jury, but when honest minds cease to differ upon the facts

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of a given case, or as to the conclusions to be drawn therefrom, the verdict of a jury must give way. It cannot avail the respondent to say that he did not hear the customary warning that the car was about to start. The warning was unquestionably given, and he was either engaged in conversation—as claimed and as testified to by one of his own witnesses—or for other cause, for which he alone is responsible, did not hear it. The respondent attempted to enter the car in a dangerous, unusual place, after the usual signals for the forward movement of the car had been given. He attempted to make the entry through a door or entrance which was not to exceed three or four feet from the barn door. He would necessarily and inevitably be caught and crushed unless he succeeded in making the entrance before the car reached the door. All these dangers were open and apparent to him. He had a better opportunity to observe and avoid the dangers than any other person. He was either negligent in not discovering or observing the danger, or he was reckless in his attempt to avoid it, and there seems no room to doubt, as a matter of law, that he was guilty of contributory negligence, and that such negligence was the direct and proximate cause of his unfortunate accident. The court should have so instructed the jury. We think it did so charge in effect, but the instruction should have been peremptory.

For this error, the judgment is reversed, with directions to dismiss the action.

[No. 5337. Decided March 22, 1905.]

H. C. PETERS, *Appellant*, v. JAMES VAN HORN *et al.*,
Respondents.¹

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—FAILURE OF TITLE—KNOWLEDGE OF VENDEE BEFORE SUIT—EQUITY—JURISDICTION. A purchaser of lands cannot maintain an action in equity for specific performance, or for damages in case specific performance cannot be had, where he knew, before the action was commenced, that the vendor could not perform the contract for want of title, since equity will not exercise jurisdiction where the remedy of damages is all that can be decreed.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 1, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

John E. Ryan, for appellant.

Root, Palmer & Brown, for respondents.

FULLETON, J.—On December 15, 1902, the respondents entered into the following contract with one J. B. Hawthorne:

“Everett, Wash., December 15th, 1902.

“In consideration of one (1) dollar to me in hand paid, and other valuable considerations, I hereby agree to sell and deliver to J. B. Hawthorne, upon payment to me of thirty-two thousand (32,000) dollars, on or before February 15th, 1903, the following described lands: The north half of the north half of sec. 25, town. 36, R. 9 E. The south half of the northwest quarter sec. 25, town. 36, R. 9 E. The northwest quarter of the southwest quarter, sec. 25, town. 36, R. 9 E. The southeast quarter of the northeast quarter sec. 26, town. 36, R. 9 E. The northeast quarter of the southeast quarter sec. 26, town. 36, R. 9 E. The south

¹Reported in 79 Pac. 1110.

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half of the southeast quarter sec. 26, town. 36, R. 9 E. The northwest quarter of the northeast quarter sec. 35, town. 36, R. 9 E. The south half of the northwest quarter sec. 35, town. 36, R. 9 E. The northeast quarter of the northwest quarter sec. 35, town 36, R. 9 E. The northwest quarter of the southwest quarter sec. 35, town. 36, R. 9 E. Also 15, 40 acre tracts along Jackman creek in sections 4-5-7-8, town. 35, R. 9 E. Also, one shingle mill, complete with machinery, dry kiln and sheds, etc., with five acres of ground including strip on which present side track or switch is located at Van Horn, Wash. Also, one flume about two and one-half miles in length. Also, one saw mill of 20,000 daily capacity located at the upper end of said flume, also logging outfit consisting of one donkey engine, wire cable, blocks, tackle and tools."

Thereafter Hawthorne sold his interest in the contract to appellant, H. C. Peters. On February 16, 1903, the respondents granted the appellant an extension of time for the performance of the contract, the same being in writing and to the following effect:

"In consideration of the cost of examining and cruising the timber, the above option is hereby extended to H. C. Peters, of St. Paul, until February 25th, 1903. And on payment of five hundred (\$500) dollars on or before said date, will be extended to March 5th, 1903; said payment to apply on purchase price if taken. On payment of full amount under this option we agree to convey to N. C. Peters, or his assigns, by warranty deed conveying good title, the said land and machinery and will furnish abstract showing good title. James Van Horn, Kate Van Horn."

And on March 5 another extension of time was granted, as follows:

"In consideration of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, the above option, in every part, is hereby extended to H. C. Peters, of St. Paul, Minn., until March 10th, 1903; and on payment of five hundred (\$500) on or before said date of March 10th, 1903, by the said H. C. Peters or his attorney, the above

and foregoing option will be extended to March 12th, 1903, said payment of \$500 to be applied on purchase price, if taken. The typewritten part of the documents hereto attached is admitted to be a true and correct copy of the original options on which the foregoing extension is given, and we hereby ratify and confirm said original options in each and every particular of the same. James Van Horn, Kate Van Horn."

On March 9 the following notice was served on the respondents:

"To James Van Horn and F. E. Randolph, his attorney:

"Dear Sirs: I hereby accept the offer made by you to myself through my attorney, John E. Ryan, on date of March 5th, 1903, for those certain tracts and parcels of timber land and all appurtenances thereunto belonging, for thirty-two thousand (\$32,000) dollars, said land and tenements being more fully and particularly described in the options given H. C. Peters at a previous date hereof. Under the terms and conditions of said options, in said aforementioned agreements, the title to the property in question was to be perfected and conveyed to me by a good and valid title or warranty deed. I further give notice that the consideration of \$32,000 is ready to be turned over, upon your delivery to my attorney, John E. Ryan, of the abstracts of title to said property, and upon his having favorably passed upon the same.

"Dated at Seattle, Washington, this 9th day of March, 1903. John E. Ryan, Attorney for H. C. Peters."

After the receipt of this notice, the respondents executed and tendered to the appellant their warranty deed to the land described in the contract, tendering at the same time an abstract showing the title they had thereto, and demanded payment of the contract price. The appellant refused to accept the deed or pay the price, on the ground that the respondents' title to a part of the land was defective. Thereafter the appellant brought this action to en-

force specific performance, or, in case specific performance could not be had, to recover damages in lieu thereof. The trial court held he could not recover, and entered a judgment dismissing his action.

It is conceded that the respondents have no legal title to a part of the lands in question; namely, those described as the "15, 40 acre tracts along Jackman creek in sections 4-5-7-8, town. 35, range 9 east." These lands were selected by virtue of the act of Congress of June 4, 1897, 30 Stat. 36, granting to the owner of a tract of land included within the limits of a public forest reservation the right to relinquish such tract to the government, and select in lieu thereof a tract of vacant land, open to settlement, not exceeding in area the tract relinquished to the government. The township from which the selections were made was not sectionized, and, of course, it was impossible to know where the lines of the particular tracts when surveyed would run. The selections were liable to be defeated, also, by adverse claims antedating the selection by the respondents, and by the lands proving to be mineral in character. There was, therefore, not only no legal title to those several tracts, but no equitable title which could with certainty be reduced to a legal title. The appellant declined to accept a part performance; he insisted that the contract be performed according to its terms, or not at all.

The question that first arises, and the only one we have found necessary to notice, is, can the appellant maintain this action? We think that, upon his own showing, he cannot. As early as 1892, in *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614, this court held that an action for the specific performance of a contract to convey real property will not lie in favor of one who knows, prior to the commencement of such action, that the defendant is incapable of performing the contract for want of title. Giving the reasons for the rule, the court said:

"It is the fundamental principle regulating the exercise of this equitable jurisdiction that, whenever the legal remedy of damage is sufficient, equity will not interfere and the specific performance will be refused. Pomeroy on Contracts, Sec. 47. We take it that the fair corollary to this proposition would be, that where the legal remedy of damages is all that can be decreed, equity will not exercise jurisdiction, and the original proposition applies more forcibly where the fact is determined that legal damages are all that is actually sought; and in this case the plaintiffs must have brought their action on the theory that a compensation in damages would furnish a complete and satisfactory remedy, for they knew that no other remedy could be decreed. The presumption that the award of damages will not be an adequate remedy is the very foundation of the jurisdiction to decree specific performance; and it philosophically and logically follows that jurisdiction will not attach when the inadequate remedy is all that can be enforced. Any other construction renders inharmonious the operations of law, and confuses the principles upon which the jurisdiction is based."

The case at bar falls within this rule. The appellant, before commencing his action, knew that the defendants could not perform their contract for want of title, for he had rejected the performance tendered for the very reason that no title was conveyed to a part of the lands by the deeds offered him. And, as he refused to accept a part performance, he must have brought his action on the theory that compensation in damages would furnish a complete and satisfactory remedy. This, we held in the case just quoted from, he is not permitted to do.

The judgment appealed from is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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Syllabus.

[No. 5264. Decided March 23, 1905.]

ENOK LARSEN, *a Minor, by his Guardian Ad Litem, Martin J. Lund, Respondent*, v. ALLAN LINE STEAMSHIP COMPANY, LTD., *Appellant*.¹

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37	555
30	438

APPEARANCE—SPECIAL—WHEN WAIVED BY SUBSEQUENT GENERAL APPEARANCE. Under Bal. Code, § 4886, providing that every application for an order is a general appearance unless stated to be special, a special appearance to set aside a default on the ground that no service had been had, although renewed at the time of filing answer, is waived where the party subsequently appeared generally to file a petition to remove the cause to the United States Court, and entered into a stipulation with reference to the matter without stating that it appeared specially, and after judgment moved for a new trial without limiting the character of the appearance; and error in refusing to set aside the service is thereby waived.

CARRIERS—INJURY TO HEALTH OF PASSENGER—BREACH OF CONTRACT TO PROVIDE FOOD—COMPLAINT—SUFFICIENCY. In an action for injury to a passenger's health, a complaint against a steamship company alleging actionable neglect on the voyage and a breach of the contract of carriage in failing to provide sufficient food and lodging, whereby the plaintiff became sick and permanently deaf, alleges a cause of action.

SAME—CONTRACT OF CARRIAGE—STIPULATION TO FURNISH FOOD—UNAVOIDABLE DELAY—CONSTRUCTION OF CONTRACT. A contract of carriage providing that the steamship company shall furnish good and sufficient food and suitable lodging during the whole of the journey, including "any unavoidable delay," must be construed to cover a delay by reason of government detention in quarantine, especially where it appears that all the food provided while in such quarantine was furnished by the steamship company.

SAME—NON-LIABILITY FOR DELAY NOT EXCUSE FOR NEGLECT. A clause in a contract of carriage exempting the carrier from liability for delay from "restraints of princes, rulers and peoples" does not relieve the company from liability for neglect in failing to provide suitable food and lodging during any such delay.

¹Reported in 80 Pac. 181.

SAME—EVIDENCE OF BREACH OF CONTRACT AND RESULTING INJURY TO HEALTH—SUFFICIENCY. In an action for damages for the breach of a contract of carriage, in failing to provide sufficient food or lodging during a time that the vessel was detained in quarantine, whereby plaintiff became sick and permanently deaf, there is sufficient evidence to sustain a finding for the plaintiff, and that his injuries were traceable to the exposure, where it appears that during the first two days the supply of food was very limited, that during two nights plaintiff had no bedding, and but one blanket during a stay of eighteen days when the nights were cold, that in consequence he became sick, and remained so, and was compelled to continue his journey while in that condition, whereupon he became delirious, that at the end of the journey, 21 days after the exposure, plaintiff's malady was meningitis, expert testimony being to the effect that deafness often resulted therefrom, and that there was no definite period of incubation of the disease which would sustain the claim that the time therefor had been too long after the exposure; and findings thereon for the plaintiff will not be disturbed because of conflicting evidence.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 20, 1904, upon findings in favor of the plaintiff, after a trial before the court, a jury being waived, in an action for damages for breach of a contract of carriage. Affirmed.

Ballinger, Ronald & Battle, for appellant, upon the point that the company was not liable for injuries suffered by reason of the detention in quarantine, cited: *The Onrust*, Fed. Cas., No. 10539; *Wilson v. Alabama etc. R. Co.*, 77 Miss. 714, 28 South. 567, 78 Am. St. 543, 52 L. R. A. 357; 22 Am. & Eng. Ency. Law (1st ed.); p. 770; *Hughson v. Winthrop Steamboat Co.*, 181 Mass. 325, 64 N. E. 74, 58 L. R. A. 432.

Martin J. Lund and Fulton & Faben, for respondent.

HADLEY, J.—This is an action to recover damages for permanent impairment of the plaintiff's health, resulting from alleged negligent acts of the defendant. The plaintiff is a minor, and Martin J. Lund is his duly appointed

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guardian *ad litem* for the purposes of this action. It is alleged, that the defendant, a corporation, is a common carrier, engaged in the business of carrying passengers for hire from Trondhjem, Norway, to Seattle, Washington; that on or about the 7th day of May, 1902, at said Trondhjem, the defendant promised and agreed to carry plaintiff as a passenger for hire from said place to Seattle for the sum of \$85; and also agreed to carry him from Liverpool, England, to Montreal, Canada, direct, without landing him at any other place than Montreal; and further agreed to furnish him, while on said journey between Liverpool and Montreal, including any delay, with good, wholesome, and sufficient food, together with good, clean, and warm quarters and bedding; that relying upon said promises, the defendant paid said sum of \$85 for transportation from Trondhjem to Seattle, and received a ticket from the defendant for said purpose; that said agreement was partly oral and partly in writing, and the portion which was in writing was contained in the ticket aforesaid, and in a written statement delivered by the defendant to the plaintiff at the time. It is alleged that, about the date aforesaid, the plaintiff commenced his said journey, and that, during the progress thereof, the defendant failed to furnish sufficient wholesome food and clean, warm quarters and bedding; that the defendant neglected to land plaintiff at Montreal, as it had agreed to do, but compelled him to land upon Grosse Isle, where he was, against his will, confined for a period of eighteen days; that he was there kept in one room with two hundred other men, and given no food for two days, except a small piece of bread, the size of a man's hand, and was furnished unwholesome and insufficient food for the remainder of the time; that, while so confined, he was furnished insufficient bedding and covering, and that the nights were cold; that by reason thereof he suffered great physical pain from hunger and cold,

and became sick and feeble; that he was sick and in need of hospital care at the time he was put upon a train, and compelled to continue his journey to Seattle, but that the defendant, knowing of his sick and feeble condition, compelled him to board the train and continue his journey; that he suffered greatly while traveling overland, and arrived at Seattle in a delirious condition; that he was, by his friends, placed in a hospital in Seattle, where he remained for six weeks; that, by reason of his said suffering, his health has been permanently injured and he has lost his power to hear in both ears, he having been thereby rendered entirely deaf for the balance of his life. He asks damages in the sum of \$25,000.

The defendant answered the complaint, denying the material averments thereof, and affirmatively alleging that it is a British corporation, engaged in carrying passengers for hire from Liverpool, England, to Halifax, Quebec, and Montreal, in Canada; that, during the month of May, 1902, the plaintiff became a steerage passenger upon one of defendant's steamships, to be transported by the defendant from Liverpool to Quebec; that during the voyage a case of sickness developed on board the steamer, and, when near the port of Quebec, the government authorities of the Dominion of Canada took possession of the steamer, and assumed control of both the steamer and the passengers; that all steerage passengers, including the plaintiff, were removed to the government quarantine station at Grosse Isle, near the harbor of Quebec, for detention under the government quarantine laws; that the detention of the steamer and passengers was caused by the quarantine authorities, without the consent of the defendant, and was an act unavoidable and beyond the control of the defendant; that the contract of passage by which the plaintiff was transported by the defendant provided, among other things, for the furnishing by defendant to plaintiff of

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medical attendance and medicine, during the voyage from Liverpool to the said place of landing; and, further, that the defendant would not be responsible to plaintiff for loss or injury by reason of restraints of princes, rulers, or other authorities. It is averred that the contract for transportation from Liverpool to Quebec was made in England, is an English contract, and governed by the laws of that country; that, under the laws of England, the defendant had a right to limit its liability as against loss or injury occasioned by the restraints of princes, rulers, or other authorities.

The material averments of the answer are put in issue by the reply, and it is affirmatively alleged in reply that, at the time of landing the plaintiff at the quarantine station, the quarters thereof were not equipped with beds, bed clothing, food, or servants for the accommodation of defendant's passengers, and that the fact of such neglect and lack of accommodations was well known to the defendant, who then and there promised and agreed to supply plaintiff and the passengers while confined there with beds, bed clothing, food, servants, and attendants for their accommodation, but that defendant neglected so to do in every particular.

Under issues essentially as stated above, the cause was tried by the court without a jury, a jury being waived, and resulted in a judgment in favor of the plaintiff in the sum of \$6,600. The defendant moved for a new trial, which was denied, and it has appealed from the judgment.

The first three assignments of error are as follows: (1) That no service of process was had upon the defendant, and that the court was without jurisdiction in the premises; (2) that the court erred in refusing to grant defendant's motion to set aside the order of default unconditionally; (3) that the court erred in requiring the defendant, as a condition of setting aside the previous order of default, to

enter a general appearance and answer. The above may be discussed together.

The return as to service recites that it was made upon appellant in King county, by delivering to and leaving with Andrew Chilberg, the managing agent of appellant, a copy of the summons and complaint. A default was entered against the appellant, based upon said service. Thereafter the appellant appeared specially, and moved that the order of default be set aside, on the ground that no personal service was had, and that the court was without jurisdiction to enter any order in the premises. The motion was based upon the claim that Andrew Chilberg was not the agent of appellant. Thereafter the court entered an order vacating the default upon condition that appellant should, within two days, answer the complaint, and, in case of failure to do so, the motion should be denied. Thereupon the appellant answered the complaint.

Respondent urges that appellant has waived the matter of service, and, also, any error in the court's conditional order of vacation, in that it has appeared generally by the interposition of an answer to the merits, upon which issues were made and tried. The authorities are not uniform upon this subject, as was conceded in *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243, where it was held that, after special appearance and objection to the jurisdiction before a justice of the peace, the submission to a trial does not constitute a waiver of want of jurisdiction. But in the case of *Walters v. Field*, 29 Wash. 558, 70 Pac. 66, it was held that, if one answers to the merits, after appearing specially, he must still preserve his special appearance, or it will be waived and his appearance will become general. Under Bal. Code, § 4886, a defendant appears when he answers, demurs, or makes any application for an order in a case, and every such appearance shall be deemed general unless the defendant in making it shall state that it is

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special. The statute seems to contemplate that *every* appearance in a cause calling for an order for any purpose shall be deemed general unless otherwise specified.

In *Walters v. Field*, *supra*, the special appearance was preserved in all motions and pleadings up to a given point, and thereafter it was not noted, by reason whereof it was held to have been waived. In the case at bar, we fail to find the original answer in the record, but the amended answer recites, preliminarily, that it is filed without waiving objections theretofore urged on special appearance.

Assuming that this was sufficient to preserve the special appearance, we are nevertheless confronted with other appearances in the record which are not so limited. The appellant filed a petition to remove the cause to the United States circuit court. Respondent answered the petition, and urged lack of jurisdiction in the latter court. Appellant replied to this plea without any limitation as to the character of its appearance. Again, while the petition for removal was pending before the federal court, a stipulation between the parties was filed in the cause, which recited certain agreed facts pertaining to the citizenship of respondent, and also stipulated that, if upon such facts the United States court had not jurisdiction, then the cause should be remanded to the state court. In said stipulation appellant in no way stated that it appeared specially for the purpose. The cause was remanded to the state court, and tried, after which appellant moved for a new trial, and afterwards filed an amended motion stating additional grounds. In neither of said motions was there any limitation as to the character of the appearance.

Therefore, even if it be conceded that the rule is adopted by this court that answering to the merits, after a special appearance, where the answer expressly attempts to preserve the rights under the special appearance, does not amount to a waiver, still the several appearances of appel-

lant last above noted were general, and, under the rule already announced by this court, as above stated, they constituted a waiver of the special appearance. What may appear to be strictness in this rule commends itself to us, for the reason that a defendant may stand upon his special appearance without the necessity of a long, tedious, and expensive trial, as was had in this case. But if he chooses to pursue the latter course, he should at least make clear with all of his appearances that he has not waived his special appearance. Any error involved in the assignments above mentioned has, therefore, been waived, and the court had jurisdiction of the person of the defendant.

The assignment that the court erred in receiving any testimony at the trial over appellant's objection, and in denying the motion of the latter to strike testimony, on the ground that the complaint failed to state any cause of action against appellant, is not well taken. The essential facts averred in the complaint are somewhat fully stated above, and we think they state a cause of action against appellant.

While the complaint alleges actionable neglect on the part of appellant during the voyage across the ocean, yet at the trial the evidence was mainly directed to the claim of neglect on its part during the period of quarantine, and upon that evidence the case seems to have been determined as it was by the trial court. It is first contended that the law does not hold appellant responsible for injuries received during quarantine. That must depend upon its contract. The original contract held by respondent was shown to have been lost, and secondary evidence as to its contents was introduced in the way of another contract, which respondent testified was in all respects like the original, with the exception of the inserted name, date and amount paid for passage. The contract as

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shown called for passage from Trondhjem to Seattle in the following manner:

"(1) By steamship to Hull, where the separate steamship ticket is to be given up. (2) By railway to Liverpool. (3) By steamship to Quebec, Boston, Halifax, Portland, Philadelphia, or Baltimore. (4) By railway to destination."

The contract also contained the following:

"During the whole journey hence to America passengers will be supplied with good and sufficient food as well as with suitable lodging, and this arrangement stands equally good in the event of any unavoidable delay or accident interrupting the journey."

The above being without any limitations, we think was sufficient to cover the "unavoidable delay" required by the quarantine. The possible delay by quarantine must have been well known to appellant as an ocean transportation company, and yet the contract covers all delays with no limitations as to quarantine. That appellant understood that it was obligated to furnish sufficient food and suitable lodging during quarantine, as well as during delays from other causes, is emphasized by the fact, which is shown in evidence, that it did furnish the food and bedding that were supplied to the passengers during the quarantine of respondent and his fellow passengers. The buildings and grounds were supplied by the government of Canada, and appellant was required to land the steerage passengers at said place; but the actual supplies were furnished and distributed by appellant.

The contract containing the above provisions was delivered to respondent at Trondhjem, where he also received a receipt for the passage money. Upon reaching Liverpool he received an additional paper called "Passengers' Contract Ticket," which specially admitted him to passage

upon the steamship "Ionian" of appellant's line. Upon the back of the latter paper was printed the following:

"Neither the ship owner nor the passage broker or agent is responsible for loss of, or injury to, the passenger, or his luggage, or personal effects, or delay on the voyage arising from steam, latent defects in the steamer, her machinery, gear, or fittings, or from act of God, Queen's enemies, perils of the sea or rivers, restraints of princes, rulers, and peoples, barratry or negligence in navigation of the steamer or of any other vessel."

It is argued that the above was a provision of a contract made in England, and that it must be governed by the laws of England. A decision of the supreme court of the United States (*Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788) was introduced in evidence for the stated purpose of showing that, under the laws of England, the appellant had a right to thus limit its liability. Without discussing that matter, it is sufficient to say that the provision in question does not purport to limit appellant's liability for what is charged against it in respondent's complaint. The liability shown in the complaint is not predicated alone upon injury arising out of mere *delay* from "restraints of princes, rulers, and peoples," but is based upon the *neglect* of appellant to furnish sufficient food, with suitable bedding and covering, during the period of such restraint. The fact that the authorities restrained and delayed respondent is not urged as a ground of recovery. That was an act intended to serve the welfare of humanity, because of the existence of a case of smallpox on board the steamer. The charge is, however, made that appellant neglected the duties which it assumed as incidental to such delay. We, therefore, think that, if such neglect has been shown, and if respondent's injuries resulted therefrom, the appellant is liable.

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It is next argued that negligence of appellant has not been shown by the evidence. There is much evidence in the record upon this subject, and there is also conflict therein; but it is conceded by appellant that, during the first two days of the quarantine, the supply of food was very limited. The respondent testified that, during the first two nights on the island, he had no bedding; and that during that time he had practically no food, by reason whereof he was very cold and hungry. He says that the third night he was furnished a single blanket and a straw mattress, which was all the bedding that was furnished him during his whole stay on the island; that the nights were cold and that, during some of the nights, water standing outside of the building was frozen; that on one side of the building there was a broken window, and that cold winds blew from the north; that, after the first night on the island, he felt sick, and so remained until he became delirious while on the train. As to some of the foregoing facts, he is disputed by other witnesses, but the court found the facts substantially as testified to by respondent, and his testimony was so corroborated that we do not feel justified in disturbing the findings. We therefore think the negligence of appellant was established.

It is further argued that it was not shown that respondent's deafness was due to appellant's neglect. There was much testimony of physicians as experts bearing upon that subject. The physician who took immediate charge of respondent upon his arrival in Seattle, and who treated him thereafter, testified that his malady was then meningitis. There was much testimony that total deafness is a common result from such affliction. An effort was made by appellant to show that respondent was feeble when he left Norway, and when he went upon the island, but we think this was by no means established. A further effort was made to show that the disease could not have result-

ed from exposure upon the island, for the reason that the time had been too long for the ordinary period of incubation for meningitis. The confinement in quarantine was eighteen days, and the entire trip overland to Seattle after his release occupied six days, making twenty-one days from the commencement of any exposure upon the island. The weight of the testimony of the physicians is to the effect that there is no definite period for incubation of the disease mentioned, and we shall not disturb the court's finding that respondent's injuries are traceable to his exposure upon the island. and to the neglect of appellant.

We find no error in the record, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5071. Decided March 23, 1905.]

YAKIMA VALLEY BANK, *Appellant*, v. CHARLES
McALLISTER, *Respondent*.¹

BILLS AND NOTES—INDORSEMENT—DEFENSES—SIGNATURE OBTAINED BY TRICK—INTENT OF PARTIES. The maker of a promissory note payable to himself is not liable thereon to a bona fide purchaser for value, where the note was made as the first step in a conditional payment for insurance, under the representation that it could not be negotiated until indorsed upon accepting the policy, and his indorsement was fraudulently secured by a trick whereby his signature to a contract penetrated through the paper on to the back of the note, without his knowledge; since it is not the physical act, but the intention of the parties that constitutes the contract of indorsement, and since the maker was not guilty of any negligent act for which he was responsible to innocent parties.

¹Reported in 79 Pac. 1119.

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Citations of Counsel.

SAME—EVIDENCE OF SIMILAR FRAUD UPON OTHER PARTIES. Where insurance solicitors obtained the defendant's indorsement of a note by a device or trick whereby his signature to a contract penetrated through the paper on to the back of the note, without his knowledge, evidence is admissible that other parties living in the neighborhood were induced to give similar notes, and their indorsements were secured by the same solicitors, in the same manner, at about the same time, since it is competent to show that the acts complained of were part of a general scheme to perpetrate this kind of a fraud upon the people of that neighborhood.

APPEAL—HARMLESS ERROR—ERROR IN ADMISSION OF EVIDENCE CURED BY INSTRUCTIONS. The erroneous admission of evidence is cured by expressly withdrawing from the consideration of the jury the issue upon which it was offered.

BILLS AND NOTES—DEFENSES—EVIDENCE—ORDER OF PROOF—GENUINENESS OF SIGNATURES—EVIDENCE OFFERED IN REBUTTAL. In an action upon a promissory note where defendant's signature is denied, it is not error to exclude expert evidence offered only in rebuttal as to the genuineness of the signature, since the burden of proof was upon the plaintiff to establish that as part of its case in chief.

APPEAL—PREJUDICIAL ERROR—ARGUMENT OF COUNSEL. A reversal is not justified by heated expressions of counsel in the argument.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered August 7, 1903, upon the verdict of a jury rendered in favor of the defendant, after a trial on the merits, in an action upon a promissory note. Affirmed.

Snyder & Preble, for appellant. The answer in legal effect admits the execution of the note. *Dinsmore v. Stimbert*, 12 Neb. 433, 11 N. W. 872; *Henry v. Hinman*, 21 Minn. 378. Upon an issue of fraud, evidence of other similar frauds is inadmissible. *McKay v. Russell*, 3 Wash. 378, 28 Pac. 908, 28 Am. St. 44; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883, 50 Am. St. 629; *Parker v. Armstrong*, 55 Mich. 176, 20 N. W. 892; *Monitor Plow Works v. Born*, 33 Neb. 747, 51 N. W. 129; *Berghoff v. State*, 25

Neb. 213, 41 N. W. 136; *Commonwealth v. Jackson*, 132 Mass. 16. Its admission was prejudicial. *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731. And could not have been cured by an unequivocal charge to the jury to disregard it. *Arthur v. Griswold*, 55 N. Y. 400. It was negligence *per se*, in intending to sign some paper, to sign a negotiable instrument without knowing it. 1 Daniels, Negotiable Inst. (4th ed.), § 850; *First Nat. Bank v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506; *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501; *Mackey v. Peterson*, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211. The issuing of a negotiable draft was sufficient consideration to make plaintiff a bona fide holder for value. 1 Daniels, Negotiable Inst. (4th ed.), § 187; *Adams v. Soule*, 33 Vt. 538; 1 Edwards, Bills and Notes, § 322.

DUNBAR, J.—This action was brought by the Yakima Valley Bank, a corporation, against the respondent, upon a promissory note for \$790.20, dated November 20, 1902, signed on the face thereof by the defendant, Charles McAllister, payable to the order of said Charles McAllister, and purporting to bear his indorsement upon the back thereof. The complaint is the ordinary complaint for recovery upon a negotiable promissory note; alleges execution and delivery of the note by defendant to one J. B. Pugsley, and the transfer before maturity to plaintiff, for a valuable consideration, in the ordinary course of business. The answer denies the execution of the note, and alleges, by way of affirmative defense, that the note was without consideration, in that it was signed on the face thereof by the said defendant in the sum of \$790.20, the amount of the annual premium upon a \$10,000 life insurance policy upon defendant's life, which said Pugsley and one E. R. Place, associated with Pugsley in business, agreed to thereafter deliver to defendant, upon the express understanding

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between defendant, and said Pugsley and Place that the note was not to be binding, and was to be returned to defendant, if, upon an examination of the said policy, defendant would not accept the same, and that defendant did not accept said policy; that the defendant did not intend to sign his name upon the back of said note, but that, as a part of said transaction with Pugsley and Place, he signed his name to a contract releasing the insurance company from liability, in case of his death while said policy was in his custody for inspection, and before he had accepted it, and that, in signing said contract, his signature penetrated through the paper upon which said contract was written, and appeared as an indorsement on said note. This is the substance of the answer. The answer, however, also alleged that the plaintiff had notice of the infirmity of the note, before it paid for the same. This was denied by the reply of the plaintiff. Upon these allegations the case went to trial.

The testimony of the defendant was to the effect that Pugsley and Place solicited him to take insurance in the Home Mutual Life Insurance Society, of New York City, and that he agreed to take a policy for \$10,000 on the condition that, when he had examined the policy and had submitted it to his legal advisers, it corresponded with the representations made by the solicitors, and that he was to have until the 1st day of January to determine, the application being made upon the 20th of November, 1902; that the solicitors or agents of the company represented to him that it would be necessary for him to draw up a note, payable to himself and signed by himself, as an earnest of his intention to do business with the company, and that it was also necessary for him to sign a contract releasing the company from liability to him, in case he should die before the final consummation of the contract, they representing to him that the note could not be collected from him with-

out an indorsement, and that he would be safe in giving them the note; that the transaction occurred in the corral of a farm in Yakima county; that he was instructed to sign the application and the release, and that he did so; that a book with several papers upon it, placed there with the ostensible purpose of making it smooth, was handed him to write upon, and a fountain pen furnished by the agents, with the instruction to bear on hard as the pen was stiff; that he was afterwards informed by the bank, the plaintiff, that they had purchased a note signed by him in the sum of \$790.20, in favor of himself and indorsed by him on the back thereof. This indorsement he denied having made, his theory being that, by the fraudulent manipulation of the solicitors, the ink had been transmitted through the agreement which he signed, on to the back of the note, which had been placed there for the purpose of receiving the signature, and that he knew nothing about the note having been indorsed until he was notified by the bank, admitting that the signature was his, or very much like his, and alleging that it was a trick and a fraud; insisting that the signature had been obtained through the perpetration upon him of a trick and a fraud, and that it was not in fact his signature. Judgment was rendered in favor of the defendant.

A demurrer was interposed to the affirmative answers of the defendant, which was overruled, and the action of the court in overruling the demurrer is the first error assigned—the appellant contending, that the allegations of fraud do not amount to a denial that the defendant indorsed the note; that the answer, in legal effect, admits the execution of the note, and at most only tenders issue as to its validity; that the charges of *mala fides* are not distinctly set forth, so that plaintiff may know the charges he has to meet; and that, if the note was indorsed through the physical act of the defendant, he is responsible for the

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payment of the note, and for the results of that physical act to an innocent purchaser. This we think is not the law under any authority. It is not the physical act which constitutes a transaction of this kind, but it is the intention of the parties to the contract. It is true that, if a party, by any negligent act, is the cause of an investment made by an innocent person on the strength and credit of that act, he cannot escape liability; but, if the matters set forth in the answer are true, there was no action on the part of the defendant at all, so far as indorsing the note was concerned. The indorsement was the effect of a fraudulent device and trick, which the defendant was in no way responsible for.

Several succeeding assignments are based upon the action of the court in admitting, over the objection of the appellant, the testimony of numerous witnesses to the effect that Pugsley and Place had perpetrated, in the judgment of the witnesses, the same fraud upon them in like transactions. It was testified by witnesses O'Neil, Purdin, Kandle and Chamberlain that, during the same month in which this transaction with respondent occurred, these solicitors had obtained their indorsement of notes in the same manner, and under the same circumstances, which were related on the witness stand by the respondent; and it is noticeable that there was a similarity of methods in each instance. The business was not transacted as it ordinarily is in a house or upon a table, but the plan was to obtain these signatures out of doors, by the buggy in which these men traveled, and in each instance, with one exception, the signatures were written upon a pocket book with documents and papers on top of it, under circumstances that would not be as liable to challenge the attention of the parties signing as would the interposition of the note under the agreement signed upon a table. In each instance these parties swore that they did not indorse the note which

they had made out to themselves, and knew nothing about their having executed such a note until notice came to them to that effect from the bank, and that they had paid the notes rather than risk a lawsuit with the company, in many instances the notes being small.

It is insisted by the appellant that this testimony was inadmissible, and reliance is placed upon the case of *McKay v. Russell*, 3 Wash. 378, 28 Pac. 908, 28 Am. St. 44; and it might appear at first blush that that case was in point in favor of appellant's contention. In that case, which was an action to recover money paid upon a contract for the sale of real estate, on the ground that the sale was procured by fraudulent representations, it was held that it was inadmissible to show that, in a similar transaction prior thereto, defendants had made like misrepresentations to another party. But an examination of that case fails to show that there was any testimony offered that would show a general scheme connecting the transaction, which it was sought to prove, with the transaction which was in issue in the case. It is no doubt true, as a general proposition, that testimony tending to show that a person has committed another crime is not admissible for the purpose of showing the probability of his commission of the crime charged. But it is equally true that it is competent to show a general scheme to defraud, so connected with the case under consideration, by time and circumstances, that it will have a tendency to raise the presumption that the fraud charged was a part of the general scheme so proven. This court held, in *Oudin v. Crossman*, 15 Wash. 519, 46 Pac. 1047, that, in an action to recover a sum of money which plaintiff had been induced to pay for the purchase of a mine, in reliance upon false representations of the defendants, evidence was admissible showing that the defendants had made representations to other parties than plaintiff, and to people in the vicinity generally, regarding

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the existence and character of the mine and the value of its ores, such representations being part of one continuous scheme or transaction for the purpose of selling the mine to any one that could be induced to buy. And so, in this case, the testimony, if true, showed conclusively a general scheme to perpetrate this particular kind of a fraud upon the people of a certain neighborhood at the same time, for the purpose of selling them insurance policies. The rule is thus clearly announced in 14 Am. & Eng. Ency. Law (2d ed.), pp. 196 and 197:

"A charge of fraud in a particular transaction cannot be proved by evidence of other and independent frauds of the party charged, though in a similar transaction, unless it appears that there is such a connection between the transactions as to authorize the inference that the frauds are both parts of a general scheme or purpose to defraud. . . . If the other fraud as to which evidence is offered is similar in character to the fraud alleged, and so connected with the transaction under investigation in point of time and otherwise as to reasonably authorize the inference that both frauds were in pursuance of a general scheme or purpose to defraud in such cases, the evidence is admissible. This is well settled as a general rule, though in its application there is not entire unanimity in the cases. The chief reason for admitting evidence of other frauds in such a case is that, where transactions of a similar character by the same party are closely connected in time, the inference is reasonable that they proceed from the same motive."

The supreme court of the United States has spoken plainly on this proposition in *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997. Suit was brought by an assignee of a policy of life insurance, obtained on the application of the assured at the instigation of the assignee, to recover of the insurers, after the death of the assured; and the defendants set up that it

was plaintiff's purpose, in procuring the insurance to be obtained, to cheat and defraud defendants, and offered to show that he effected insurances upon the life of the assured in other companies at or about the same time, for the like fraudulent purpose; and it was held that the testimony was admissible. In the course of the opinion, it is said:

"A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act;"

citing *Butler v. Watkins*, 13 Wall. 456, 20 L. Ed. 629, where it was said:

"In actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time and in relation to a like subject, was actuated by the same spirit."

This case also cites many cases in support of this view of the law. We think that, while it is difficult to apply the rule to varying circumstances, the circumstances surrounding these transactions, as shown by the testimony, bring the case squarely within the rule that testimony tending to show a general scheme to perpetrate a fraud is admissible.

But, even if the admission of this testimony had constituted reversible error, it was cured by the instructions of the court, which we think were more favorable to the appellant than they should have been. After the conclusion of the testimony the court, evidently taking the view of the law that this testimony could not be admitted, as against a bona fide purchaser of the note, instructed the jury as follows:

"This case has been tried upon two theories, and evidence has been received here by the court in support of each

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theory. Part of the testimony received here, in the opinion of the court, is entirely competent in support of one of these theories, but it is incompetent in support of the other theory. These two theories are these: First, that the plaintiff in this action was a bona fide holder of the promissory note in suit, and second, that the plaintiff was not a bona fide holder of the promissory note in suit."

Then the court proceeds to state what a bona fide holder is and says:

"Under the admitted facts in this case, I charge you as a matter of law that the plaintiff in this action is a bona fide holder of the note in suit."

Continuing, the court says:

"Certain testimony was received here tending to show that other notes were received by these parties by the same means. In the opinion of the court this testimony was competent as tending to show that the note was obtained by fraud and without consideration. But these questions of fraud and failure of consideration the court now withdraws from you, and I charge you, as a matter of law, that you cannot consider in this trial the testimony relating to the other acts, if any, committed in this case. In other words, proof tending to show other forgeries, or tending to show the obtaining of other notes under like circumstances, is not competent as to whether this note was or was not indorsed, and you cannot consider it in that light. The only question that I will submit to you, as I have stated, is the one in answer to the question as to whether this defendant indorsed his name on the back of this note."

It is alleged that the court erred in that part of the instruction quoted above, viz.: "In the opinion of the court this testimony was competent as tending to show that the note was obtained by fraud and without consideration." But a glance at the instructions in the record shows that the court withdrew this testimony from the consideration of the jury by withdrawing from their consideration the question of fraud and failure of consideration, as affecting

a bona fide holder. We will not specially review the alleged errors in refusing to instruct, for we think the instructions of the court, as given, covered the whole case, and were favorable to appellant. Nor did the court err in refusing to admit the so-called expert testimony in relation to the genuineness of the signature. The signature had been denied by the answer, and the burden, under such circumstances, was upon the plaintiff, in its case in chief, to prove the signature, and being offered only in rebuttal it was not competent. Nor do we think that the somewhat heated expressions of counsel in the argument of the case would justify a reversal of the judgment.

No discernible error appearing in the record, the judgment is affirmed.

MOUNT, C. J., HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5407. Decided March 23, 1905.]

JOHN WEBER *et al.*, Respondents, v. SNOHOMISH SHINGLE Co., Appellant.¹

APPEAL AND ERROR—REVIEW—VERDICT ON CONFLICTING EVIDENCE. Where an issue as to the terms of a contract virtually becomes one of veracity between witnesses, and upon which reasonable men might differ, the conflict in the evidence being substantial, the verdict of a jury will not be disturbed on appeal.

APPEAL AND ERROR—EXCEPTIONS TO INSTRUCTIONS—WHEN TO BE TAKEN. Exceptions to instructions must be taken before the jury returns the verdict, and a stipulation that they might be taken at any time before the filing of a proposed statement of facts is unavailing to secure the review of exceptions taken long after judgment and without ever being called to the attention of the trial court.

CONTRACTS—BREACH—DAMAGES—EVIDENCE—FAILURE OF PROOF. In an action for damages for the breach of a contract whereby

¹Reported in 79 Pac. 1126.

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Opinion Per Root, J.

plaintiff was to deliver the timber upon a certain tract of land. there is a total failure of proof where the evidence was meager and uncertain, and insufficient to show the amount of timber left on the land, its value, or the cost of cutting it.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered March 8, 1904, upon the verdict of a jury rendered in favor of the plaintiffs for \$740.42 damages for breach of contract. Affirmed except as to \$150.

Hathaway & Alston, for appellant.

Cooley & Horan, G. D. Eveland, F. D. Lewis, and E. C. Dailey, for respondents.

Root, J.—This is an action brought by respondents against appellant upon two alleged causes of action, one to recover \$150.00 as damages claimed to have resulted from the breach of a contract wherein and whereby respondents were to deliver, in the river near Novelty, the timber upon a certain tract of land described in the complaint; and the other to recover \$682.40 claimed to be a balance due on account of timber furnished under said alleged contract. The case was tried to the court and a jury, and resulted in a verdict in the sum of \$740.42, in favor of respondents. A garnishment proceeding intervened, and judgment was entered in favor of these respondents in the sum of \$712.37. From this judgment appeal is taken.

Respondents claim that appellant agreed to buy all of the timber referred to, and pay \$8.00 per thousand feet therefor, to furnish boom chains, and to advance money with which to do the logging, and to receive the logs in the river at Novelty. Appellant contends that it agreed to purchase from respondents whatever first class cedar shingle logs it might need, at the market price of said logs, to be delivered at its mill at Snohomish; that it advanced

certain money to respondents, paid certain items of indebtedness held by lien claimants against the logs cut by respondents, and incurred other expenses relative thereto; that the logs furnished by respondents were of a very inferior quality, and much less in quantity than claimed by respondents; and that it had more than paid respondents all that they were entitled to. It is undisputed that appellant ceased to furnish respondents money before all the timber was removed from the land, and that respondents were obliged to quit logging on that account.

Appellant assigns two errors only; first, the overruling of appellant's motion for a new trial; second, error in one of the instructions to the jury. The first assignment presents only the question of the sufficiency of the evidence to sustain the verdict; it being contended by appellant that the respondents did not establish the terms of the contract they alleged by a fair preponderance of the evidence, and also that the contract, as alleged and proven by respondents, is indefinite and uncertain. It is conceded that there were some verbal negotiations between these parties for the purchase of timber. It is admitted that appellant agreed to, and did, furnish boom chains, and did advance to respondents money on two different occasions, besides paying off certain lien claims. Upon the question of the amount to be paid per thousand, and as to the question of the quality and quantity of timber to be furnished, and the place of its delivery, there was an irreconcilable conflict in the testimony. Mr. Weber, one of the respondents, testified in regard to these matters, among other things, as follows:

"I asked Mr. Ames [one of the officers of the appellant company] what he would pay for shingle logs; I told him I thought I had 300,000. Previous to that time, I think before the 12th, I had been up there twice to see the timber, and while it wasn't first class timber, still it was good shingle timber; . . . I asked him if he

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would pay me \$8.00 for that timber and furnish the boom chains and run the boom, as I had no way to get the booms down, and it wouldn't pay me to invest in the boom chains; he said he had plenty of those and I said also, I says, 'We'll have no money when we get through here making this deal and I'll have to have some money to run the camp with; can I get what I need if I come down here?' He says 'Yes; that will be all right.' "

Besides this, he testified to other details and as to the amount and character of timber delivered, and as to the amount yet remaining upon the land when the breach of the alleged contract occurred. As to some of these matters, his testimony was corroborated by other witnesses. Upon rebuttal, he flatly contradicted the testimony of Mr. Ames and Mr. Patton, the appellant's officers, regarding the terms of the contract as appellant claims it was made. The question as to the terms of the contract virtually becomes one of veracity between Weber on one side, and Ames and Patton on the other, although the testimony given by the last two referred to different conversations, at none of which were they both present. It was contended by respondents that the price of timber went down during the existence of the contract, and that this was the motive of appellant in declining to carry out the same.

The credibility of witnesses is ordinarily for the jury. It is their province to weigh the testimony of witnesses in the light of all of the admitted and established facts in the case, and to arrive at their verdict accordingly. The appellant urges that a court may set aside a verdict for insufficiency of evidence, even though there be some evidence to sustain it. This is undoubtedly true, and has been so held by this court; but where the conflict of evidence is a substantial conflict, and where honest, intelligent, reasonable men, might reasonably differ as to what the verdict should be, the appellate court will ordinarily not reverse

a verdict which the trial court has considered upon appropriate motion and refused to disturb.

The evidence introduced by respondents, as to their second cause of action, before resting their case, was undoubtedly amply sufficient, if believed by the jury, to sustain a verdict in favor of respondents. The evidence introduced by the appellant, in so far as it tended to establish a defense, was contradicted by respondents' evidence in rebuttal. A jury and the trial judge saw the witnesses, and had the advantage of observing their conduct upon the witness stand, and their manner of testifying, and of weighing the evidence in the light of all the surrounding circumstances. We cannot say, as a matter of law, that the verdict of the jury should not have been for respondents. The evidence not being overwhelming in favor of appellant, and it appearing that there was competent evidence upon all of the material issues involved in the second cause of action, and a substantial conflict as to many of these questions, we are constrained to hold ourselves bound by the verdict, so far as it bears on those issues.

It is also contended by appellant that the trial court erred in a portion of its instructions given to the jury upon the question of the measure of damages. The record, however, is not such as to enable us to examine this error. It appears from the statement of facts that a stipulation was entered into, by which the attorneys of the respective parties hereto agreed that exceptions to the trial court's instructions might be taken at any time prior to the filing of a proposed statement of facts. Respondents contend that such a stipulation cannot be legally made, and is of no binding force. The statute, Bal. Code, § 5053, provides that an exception may be taken after the jury has retired, and, "if practicable, before the verdict has been returned." We think that a stipulation of this character, made in open court or made with the consent of the trial court, is binding

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upon the parties to the extent of extending the time for any period not beyond the entry of the judgment. Where an exception to an instruction is attempted to be taken after the entry of judgment, it is a vain and useless ceremony. The purpose of taking an exception is to give the trial court a chance to correct the error. They should be taken before the jury returns with its verdict, so that the trial court, if it deem the exception well taken, may recall the jury and properly instruct them with reference to the matters in question; but if the respective parties are content to have the time extended and can get the consent of the trial judge to such extension, there is no one who can be heard to object. But when a motion for a new trial is interposed and disposed of, and final judgment rendered and entered, the trial court is no longer able to consider or correct errors which it may have made prior to judgment. If appeal is taken from said judgment, and the appellate court is called upon to review an exception taken after judgment, it involves the consideration of an alleged error which the trial court has never had an opportunity to correct. This court cannot consider an alleged error, excepted to in that manner. Every error of the trial court should be called to its attention in some manner. In the case at bar it appears that the exception to the questioned instruction was not filed until long after the entry of judgment, and it does not appear that it was ever called to the attention of the trial court. This being true, it must be disregarded here. In the case of *Jones v. Jenkins*, 3 Wash. 22, 27 Pac. 1022, this court said, "Every point relied upon as error here must have been called to the attention of the trial court in some manner and at the proper season." See, also, *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098, and *Tacoma Grocery Co. v. Barlow*, 12 Wash. 21, 40 Pac. 380.

As to the first alleged cause of action in the complaint, we do not believe it states facts sufficient to constitute a

cause of action; but this point is not raised in the brief, and does not appear to have been raised in the lower court. It would therefore be disregarded, and the complaint deemed amended to correspond with the proof, if the latter were sufficient to sustain a cause of action. But the evidence in support of this alleged cause of action is meager, indefinite and uncertain; and is insufficient to show the amount of timber left upon the land, its reasonable market value at the time of breach of contract, and entirely wanting as to the cost of cutting and putting it in the river—all of which were facts necessary for respondents to establish as prerequisites to a recovery. We think there was a failure of proof to establish any damages under this alleged cause of action. One of the grounds of the motion for a new trial was “insufficient evidence to justify the verdict,” and another ground was “error in assessment of amount of recovery.” The jury appears to have allowed the full amount claimed by respondents in their evidence. This was erroneous to the extent of the \$150 involved in the first cause of action. That amount will be deducted from the judgment entered by the superior court, and, as modified, said judgment in the sum of \$562.37 will be affirmed. Costs in this court to appellant.

MOUNT. C. J., DUNBAR, CROW, and RUDKIN, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

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Syllabus.

[No. 5292. Decided March 23, 1905.]

CITY OF SPOKANE *et al.*, Appellants, v. W. J. SMITH,
Respondent.¹

MUNICIPAL CORPORATIONS—ORDINANCES—COSTS IN POLICE COURT—APPROVAL OF COST BILL BY CITY ATTORNEY. An ordinance designating a fund from which to pay the witnesses subpoenaed by the city in police court trials, is not invalid by reason of failing to provide for payment of the defendant's witnesses, since mere silence as to defendant's witnesses does not negative the liability therefor provided by statute.

SAME—COURTS—CRIMINAL LAW—VIOLATION OF ORDINANCE—CRIMINAL PROCEEDING. A proceeding in a police court for the violation of an ordinance, by which one is arrested and restrained of his liberty, is a criminal proceeding.

SAME—APPEAL—RIGHT TO JURY TRIAL ON APPEAL FROM POLICE TO SUPERIOR COURT. Laws 1903, p. 34, providing for the right of appeal from the police court to the superior court, carries the right to a full trial by jury, and is not limited merely to review for error.

MUNICIPAL CORPORATIONS—PROSECUTION FOR VIOLATION OF ORDINANCES—LIABILITY FOR COSTS IN POLICE COURT—ACQUITTAL OF DEFENDANT—SAME COSTS IN SUPERIOR COURT. Where defendant is acquitted in the police court upon a charge of violating an ordinance, the city is liable for all costs, under Bal. Code, § 1627, and when he appeals from a conviction to the superior court and is there acquitted, he is entitled to the same costs, especially in view of Bal. Code, § 7009, providing that no prisoner who is acquitted shall be liable for costs.

APPEAL AND ERROR—JURISDICTION IN MANDAMUS IRRESPECTIVE OF AMOUNT IN CONTROVERSY OR VALIDITY OF STATUTE. Upon an appeal from an order made in a proceeding in the nature of mandamus, compelling a city attorney to approve a cost bill, the supreme court has jurisdiction irrespective of the amount in controversy, and although the validity of a statute is not involved.

MUNICIPAL CORPORATIONS—ORDINANCES—COSTS IN POLICE COURT—APPROVAL OF COST BILL BY CITY ATTORNEY. Under an ordinance designating a fund from which to pay the witnesses subpoenaed by the city in police court trials, and providing for their payment

¹Reported in 79 Pac. 1125.

upon the city attorney's approval of the cost bill, without making any provision for the defendant's costs, the city attorney is not required to approve the defendant's cost bill, although the city is liable therefor by statute, since the city's liability is not dependent upon the approval of the city attorney as a condition precedent.

Appeal from orders of the superior court for Spokane county, Richardson, J., entered April 7 and 11, 1904, requiring a city attorney to approve a cost bill for witness fees, and overruling the city's objections to the jurisdiction. Reversed.

E. O. Connor, for appellants.

J. M. Simpson and *R. L. Edmiston*, for respondent.

HADLEY, J.—This appeal involves a proceeding in the nature of mandamus against the corporation counsel of the city of Spokane and his assistant. Respondent was arrested and tried before the police court of said city, on the charge of permitting an animal to run at large within the city limits, in violation of a city ordinance. He was found guilty in the police court, and a fine was assessed against him. He appealed to the superior court where, by the verdict of a jury, he was found not guilty. A cost bill was thereupon filed for the fees and mileage of respondent's witnesses who attended upon the trial in the superior court, the total amount claimed being \$199.60. An application in the form of a motion, supported by affidavit, was then made to the court, to require the corporation counsel of the city to approve the cost bill. An order to show cause why he should not approve it was issued upon said application. Thereupon the corporation counsel appeared specially, and objected that the court had no jurisdiction or power in the premises. The objection was overruled, and thereafter the court entered an order to the effect that certain witnesses named are entitled to fees and mileage, amounting in

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the aggregate to \$164.40, and that the several items are proper charges against the city. The order also required the corporation counsel and his assistant to forthwith approve the cost bill. This appeal is from said order.

The effort to secure the approval of the corporation counsel, and also his refusal, are based upon the contentions of the respective parties as to the force of a certain city ordinance. The ordinance creates what is called a "police court fund" of said city, specifying what moneys shall be placed therein, and provides that witnesses and jurors in attendance upon the police court shall be paid from said fund. A section of the ordinance also provides as follows:

"Witnesses subpoenaed by the city, duly in attendance upon the superior court of this county, in cases upon appeal from the police court, may be paid from said sum upon a certificate from the county clerk containing the name and amounts due such witnesses, and upon same being approved by the corporation counsel, or his assistant, said certificate shall be filed with the city comptroller, who shall transmit same to the city council for final action."

It will be seen that, by the terms of the ordinance, witnesses subpoenaed by the city, in cases appealed from the police court to the superior court, shall be paid from the above mentioned fund, when the amounts have been approved by the corporation counsel. The ordinance is absolutely silent as to any fund or method for payment of witnesses subpoenaed by the defendant, when the cause is appealed and tried in the superior court. Appellants' contention is that, inasmuch as the ordinance does not, in terms, provide for the payment of defendant's witness fees in the superior court, no fees are therefore recoverable against the city. But respondent, upon the other hand, contends that the fees are recoverable and assumes that, before they can be recovered, the items must receive the ap-

proval of the corporation counsel. We shall examine these respective contentions.

It does not necessarily follow from the mere fact that a certain fund is designated for the payment of the city's own witnesses, and the manner of payment outlined, that the city thereby meant to say that it would not in any manner become liable for the fees of a defendant's witnesses on appeal. The section deals affirmatively with the payment of the city's witnesses, and there is nothing to negative liability for the defendant's witness fees, unless it is inferred from the mere fact of silence upon the subject. This is not sufficient to establish the city's intention to declare that it is not liable, and we think the ordinance is, therefore, not invalid as conflicting with any statute, if there is any statute that makes the city liable, a subject which we shall next examine.

Appellants argue that charges for the violation of municipal ordinances are quasi criminal, and not criminal causes. It is true, they have been often so designated, but where one is arrested and restrained of his liberty, the proceeding partakes of all the essential features of a criminal cause, and it would seem to be immaterial by what name it is called. The statute of 1903, p. 34, § 1, Session Laws of that year, specifies causes to come before the police judge as both civil and criminal. The legislature must have intended to apply the term "criminal proceedings" to such as the one under which respondent was apprehended here. That statute provides that "all civil or criminal proceedings before such police judge and judgments rendered by him shall be subject to review in the superior court of the proper county by writ of review or appeal." Appellants insist that the above authorizes nothing more than a review for mere error, and that it does not include the right of trial by jury. We think the term "appeal" is sufficient to carry the right to a full trial, inasmuch as the

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superior court is not an appellate court for the mere review of error on appeal, but reaches matters of error by the writ of review when error only is sought to be corrected. The case is, therefore, triable on appeal in the same manner as an ordinary criminal case.

Bal. Code, § 1627, should undoubtedly be held to make the city liable for all costs, when the defendant is acquitted in the police court, and, inasmuch as he is given the right to appeal from an adverse judgment in the police court, and to have further trial in the superior court, it logically follows that the same disposition as to costs shall be made upon his final acquittal on appeal. This view is also emphasized by Bal. Code, § 7009, which provides that no prisoner who is acquitted shall be liable for costs, but that, in every such case, the defendant's witnesses shall be paid as other costs in the case. It follows that the statutes of the state authorize the recovery of these costs from the city, and, if the ordinance were intended to provide otherwise it would be invalid.

The point is made on motion to dismiss this appeal, that the amount involved is not sufficient to give this court jurisdiction. But we think the proceeding which led up to the order appealed from is in the nature of mandamus to compel the corporation counsel and his assistant to approve the cost bill, and that the order essentially performs the office of a writ of mandate. We therefore think this court has jurisdiction to determine the mandamus feature involved. We have discussed the chargeable character of these costs, because one portion of the order appealed from declared them to be such, and for the further reason that appellants argue that, in doing so, the court held the above mentioned ordinance to be invalid, and that its validity is involved on this appeal; thus giving this court jurisdiction on that ground. The record, however, nowhere shows that the court intended to hold the ordinance

invalid, and our argument above is intended to show that, while there is a statute making the costs recoverable from the city, yet the ordinance, by its terms, does not necessarily conflict with the statute so as to make the trial court's holding involve the validity of the ordinance. The question of the validity of the ordinance is, therefore, not involved on the appeal, but that of the duty of the corporation counsel in the premises is before us.

The question is whether that officer is under the legal duty of formally approving this cost bill, so that he is subject to the peremptory order of the court, the equivalent of a mandate, requiring him to perform it. If, as an officer, he is under such duty as makes him subject to such a mandatory order, there must be some statute or ordinance declaring the duty. The only declaration of a legislative character upon the subject which is urged by respondent is the ordinance we have discussed. That ordinance specifically makes it his duty to approve the items for witness fees due to witnesses subpoenaed by the city, and which alone are expressly made payable from the police court fund. The ordinance specifies no other duty to be discharged by the corporation counsel. We have seen that these costs are made collectible by statute, but there is no statute or ordinance making their collectibility dependent upon the approval of the corporation counsel, as a condition precedent. There is, therefore, no reason why that officer should be required to appear to a court proceeding the avowed purpose of which is to require him to perform an alleged duty which does not exist by law. We therefore think the court erred in overruling the motion to dismiss the proceeding for want of jurisdiction. The order appealed from is reversed, in so far as it relates to the alleged duty of the corporation counsel and his assistant in the premises, and the cause is remanded with instructions to grant the motion to dismiss the proceeding as to

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said officers. The appellants shall recover costs of the appeal.

MOUNT, C. J., DUNBAR, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5208. Decided March 23, 1905.]

E. E. GILMER, *Respondent*, v. HOLLAND INVESTMENT
COMPANY, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in a case tried *de novo* on appeal is harmless, as such evidence will be disregarded.

TRIAL—NONSUIT IN EQUITY—WAIVER. The defendant waives a motion for nonsuit in an equity case by proceeding with the trial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 30, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to wind up a corporation. Affirmed.

G. M. Emory, for appellant.

Fulton & Faben, for respondent.

PER CURIAM.—The appellant is a corporation, organized under the laws of this state. Its articles of incorporation authorize it to engage in several distinct lines of business, and, as one of such, it engaged in a sort of a building and loan business. It is somewhat difficult to understand, even when aided by the explanations of the president of the corporation, just what rights were granted a subscriber by the contract issued to him. In the language of that officer, these contracts were "a peculiarly reading proposi-

¹Reported in 79 Pac. 1103.

tion;" but the general scheme was that, whenever enough money had been paid in by the subscribers to equal the face value of a contract, that sum was to be loaned to the oldest contract holder to be used in building a home; he agreeing to repay the money in monthly installments of fixed amounts. How the scheme would have worked in practice, the evidence does not disclose. The only contracts that ever matured were those held by officers of the company, and they did not seem to care to take advantage of the privileges the contracts afforded. In lieu thereof they built some three houses, which they assert the corporation holds in trust for its home building fund, notwithstanding the titles thereto stand in the name of certain of its officers.

This action is brought by a contract holder for the purpose of having a receiver appointed, the affairs of the corporation wound up, and its property divided among those entitled thereto. The right to the relief is based on the allegation that the affairs of the concern have been mismanaged, that it is insolvent, and that the scheme pursued is incapable of successfully working out, even if honestly and competently managed. The court found, after hearing the evidence, that the allegations of the complaint were proven, and appointed a receiver to take possession of its property for the purpose of winding up its affairs.

The appellant complains that the court erred in overruling its objections to certain evidence, when the respondent was being examined in chief, and in refusing to sustain its motion for a nonsuit, made at the conclusion of the respondent's case in chief. The complaint that the rules of evidence were violated while the plaintiff was being examined we think is just; and it may be that, did the record show nothing more than the evidence introduced on the part of the plaintiff, we would reverse the judgment, but both of these questions are moot questions on this appeal.

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In so far as improper evidence was admitted, we will disregard it; and the appellant waived its right to insist on its motion for nonsuit by going on with the trial. The case is tried here *de novo*, and this court will test the validity of the judgment by the record as a whole, not from any particular part of it. On the only question remaining, the sufficiency of the evidence, we think the record abundantly justifies the court's conclusion, after eliminating everything that could possibly be questioned. Indeed, the evidence of the president alone, in our opinion, justifies the lower court's finding.

There is, therefore, no reversible error in the record, and the judgment will stand affirmed.

[No. 5353. Decided March 23, 1905.]

BUFFALO PITTS COMPANY, *Respondent*, v. ISAAC DEARING
et al., *Appellants*.¹

JUDGMENT—VACATION—SUBSEQUENT JUDGMENT ON MOTION FOR NEW TRIAL. After a final judgment is entered in the cause, a subsequent judgment for the opposite party, entered upon a motion for a new trial, without disposing of or mentioning the first judgment, does not operate as a vacation of the first judgment, and is void, since the entry of a subsequent judgment is not a method provided by law for disposing of the first judgment.

Appeal from a judgment of the superior court for Adams county, Neal, J., entered May 10, 1904, in favor of plaintiff, upon its motion for a new trial after the entry of judgment in favor of the defendants, in an action upon promissory notes. Reversed.

Zent, Lovell & Linn, for appellants.

O. R. Holcomb, for respondent.

¹Reported in 79 Pac. 1104.

PER CURIAM.—In June, 1903, the appellants purchased of the respondent a threshing machine and its equipment, agreeing to pay therefor the sum of \$1,275. As evidence of the contract, they executed and delivered to the respondent their four promissory notes, and secured the same by a chattel mortgage upon the property purchased. As a part of the contract of sale, the respondent gave the appellants a written warranty to the effect that the machine was made of good material, and capable of doing the work for which it was intended. This general warranty was followed, however, by a number of conditions, so many in fact that, if printed in the style of the present volumes of the reports of this state, they would fill at least four pages of that work, failure to comply with any one of which, either in its substance or in the manner prescribed for compliance therewith, would, it was provided, render the warranty inoperative, and relieve the company from liability thereon. The machine failed to work on trial, and the appellants sought to comply with the condition of the warranty and obtain a release from their obligations. They did not succeed to the satisfaction of the respondent, and that company commenced this action to foreclose their mortgage and obtain a judgment upon their notes. The appellants defended on the ground of a breach of warranty. The issues as made by the pleadings were submitted by the court to the jury, who found in favor of the appellants on all of the issues. The court thereupon made findings corresponding with the findings of the jury, and entered a decree to the effect that the respondent take nothing by its action, and that the appellants recover their costs. The respondent thereupon filed a motion, in the form, and reciting the grounds, of a motion for a new trial, whereupon the court, without vacating, setting aside, or even mentioning, so far as the record shows, its former findings and judg-

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Syllabus.

ment, made new findings in favor of the respondent, and entered a new judgment in its favor for the relief prayed for in its complaint. It is from the last mentioned judgment that this appeal is taken.

The judgment appealed from must be reversed. After the court had entered one final judgment in the cause, it was without power to enter another one, so long as the first stood on the record as a valid and binding judgment. It is not pretended that the first judgment was void. The court seems to have thought that the entry of the second judgment operated, of itself, as a vacation of the first, although not mentioned in the second judgment. But it could not have that effect. When a judgment, not void on its face, is once entered, it must stand as the judgment in the cause until it is vacated, modified, reversed, or disposed of by some means provided by law; and the entry of a subsequent judgment in the same cause is not a method provided by law for disposing of an original judgment.

The subsequent judgment was void when entered, and the appellants are entitled to have the same reversed, vacated and held for naught. The order and judgment of this court will go accordingly.

[No. 5068. Decided March 23, 1905.]

37	593
142	100

W. W. LAVANWAY *et al.*, Respondents, v. JOHN CANNON *et al.*, Appellants.¹

ACTIONS—JOINDER—APPEAL—HARMLESS ERROR IN JOINDER OF CAUSES. Error in the joinder of causes of action *ex contractu* and *ex delicto* is not prejudicial, where the verdict upon the cause of action improperly joined is in favor of the defendant, and said cause is dismissed.

¹Reported in 79 Pac. 1117.

38-37 WASH.

CONTRACTS—CERTIFICATE OF ARCHITECT. A clause in a building contract requiring a certificate from two architects showing the completion of the work, is waived where the architects were co-partners and the partnership was dissolved shortly after the contract was made, and the owners refused to allow one of the architects to have anything to do with the work, both parties having accepted certificates of the other architect and acquiesced in his sole control of the whole work.

SAME—COMPLETION OF BUILDING—UNPAID CLAIMS OUTSTANDING—BALANCE OF PRICE WHEN DUE TO CONTRACTOR. Where a building contract provided that the architect should give his certificate that the building was completed in accordance with the terms of the contract, and that the owner thereupon agrees to pay the price upon a showing by the contractor that no outstanding bills were unpaid, and further provided that, if there were any outstanding claims after final payment, the amount should be refunded by the contractor, the certificate of the architect, given in good faith upon completion of the building, and such showing by the contractor, is all that is required to show that the balance on the contract was due, although an unpaid claim was outstanding.

MECHANICS' LIENS—FORECLOSURE—PARTIES—LIENORS SUBSEQUENT TO COMMENCEMENT OF ACTION—PRACTICE. In an action by a contractor to foreclose a mechanics' lien, in which the owner answers that a materialman had filed a lien for material which the contractor had agreed to pay, it is not error to deny defendant's motion to make the materialman a party, where his lien was filed after the commencement of the action; since in such case, under the statute, the lien claimant cannot bring an independent action, and must himself apply to be joined by way of intervention.

APPEAL—REVIEW—HARMLESS ERROR. Error in instructions upon an issue found in favor of appellants is immaterial.

MECHANICS' LIENS—FORECLOSURE—ATTORNEY'S FEES—ALLOWANCE IN SUPREME COURT. In an action to foreclose a mechanics' lien, in which the trial court fixed the amount of the attorney's fees, independent attorney's fees will not be allowed in the supreme court upon affirming the judgment.

Appeal from a judgment of the superior court for King county, Morris, J., entered September 30, 1903, upon the advisory verdict of a jury and findings rendered in favor of plaintiffs, in an action to foreclose a mechanics' lien and for damages. Affirmed.

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Opinion Per MOUNT, C. J.

William Martin and W. A. Keene, for appellants.

Benton Embree, for respondents.

MOUNT, C. J.—Respondents brought this action in the court below to foreclose a mechanics' lien, and for other relief. The complaint, in substance, alleges, a contract with appellants to construct a certain building in Seattle; a compliance with all the terms of the contract; a balance amounting to \$5,250.80, due thereon from appellants; and a lien for that amount, properly filed, against the building and the land on which the building is located. For a separate cause of action, the complaint alleges, that the superintendent of the work, appointed by, and acting for, appellants, was incompetent and unfit to perform his duties, which fact was known to appellants; that such superintendent interfered with and delayed the work of respondents under the contract, by unnecessarily requiring changes and alterations, and then requiring the same to be changed again to the original condition; by which respondents were damaged. It further alleges that appellants failed and neglected to have the foundation ready for respondents at the specified time, and that damages were caused thereby. It further alleges that appellants failed to furnish certain materials as agreed, and that respondents were damaged thereby. Other damages of this character were alleged, amounting in the aggregate to \$3,700. The prayer of the complaint was for a decree foreclosing the lien for \$5,250.80 and costs, and for a judgment for damages, and for general relief.

Appellants filed a motion to strike the second cause of action stated in the complaint, upon the ground that two causes of action had been improperly joined. This motion was denied, and a demurrer was then filed, based upon the same ground, which demurrer was also denied. The appellants then answered, denying the allegations of the

complaint, and also stating several separate defenses, one of which—and the only one necessary to be considered now—was that the contract provided that respondents should pay all claims for labor and material furnished by them, that the Washington Cornice Company had not been paid for certain materials furnished, and had filed a lien upon the building for the sum of \$799.90, which was due and unpaid. Respondents in reply denied all the facts alleged in these several defenses.

Appellants then moved the court to require the respondents to make the Washington Cornice Company a party to the action. This motion was denied. Subsequently the case came on for trial upon the issues, before the court and a jury, the jury being called as advisory upon the first cause of action, and to pass upon the question of damages alleged in the second cause of action. The jury, after hearing all the evidence in the case, found in favor of appellants as to the second cause of action, and, in answer to special questions upon the first cause of action, found that there was due respondents upon the original contract price, \$2,000, and for extras, \$800. The court thereafter disregarded the special findings of the jury upon the first cause of action, and found that respondents were entitled to the sum of \$4,328, upon the first cause of action, and entered a decree foreclosing the lien for that amount, together with attorney's fees and costs, but dismissed the case as to the second cause of action stated in the complaint. The appeal is prosecuted from this decree.

It is contended that the lower court erred in denying the motion to strike, and in denying the demurrer, because actions *ex contractu* cannot be joined with actions *ex delicto*. Lengthy arguments are made in the briefs upon this question. But it is not necessary to decide it in this case, because, even if the second cause of action was improperly joined, both the jury and the court found in favor

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Opinion Per MOUNT, C. J.

of appellants upon this cause, and a judgment was finally entered dismissing as to it. The appellants have not been injured by the joinder, and cannot now complain that it was not stricken upon their motion. If the court had considered this second cause of action, and found upon it in favor of the respondents, it would then be necessary for us to decide the question presented. Where it is entirely eliminated by a decree in favor of the appellants, there can be no error of which the appellants may complain.

It is next contended that the lower court should have found upon the facts in favor of appellants, for three reasons: (1) That the contract required certificates from two architects showing completion of the work, while the evidence shows that such certificate was signed by but one of these architects; (2) that the contract provided that the respondents should pay all claims which might become liens upon the property before final payment should become due; and (3) that the evidence is not sufficient to support the findings in favor of the respondents. This last reason is based upon the first two stated.

Upon the first of these points, the architects named in the contract, Donnellan and Donahue, were copartners, engaged as architects at the time the contract was entered into. Shortly after that time this copartnership was dissolved, and the appellants refused to permit the architect Donahue to superintend or direct the construction of the building, or assist therein in any way, and he did not do so. The whole work was carried on under the sole direction of the other architect, Mr. Donnellan, and both the appellants and the respondents acquiesced therein. Appellants accepted Mr. Donnellan's certificates of estimates during the progress of the work, and paid the same without objection. While the contract provided that estimates and certificates of work done should be issued by P. J. Donahue and J. J. Donnellan, supervising architects, yet

this provision could be waived by common consent, and no doubt was waived, under the circumstances stated, so that Mr. Donnellan was the only one who was authorized to issue certificates required by the contract. *Fitts v. Reinhart*, 102 Iowa 311, 71 N. W. 227; *Griffith v. Happersberger*, 86 Cal. 605, 25 Pac. 137, 487; *Smith v. Alker*, 102 N. Y. 87, 6 N. E. 791; 9 Cyc. 646.

Upon the second point, the contract provides:

"And it is further understood and agreed that, upon the completion of said work on said building, and within ten days thereafter, upon a certificate issued by the architects, that said work has been completed in accordance with said plans and specifications, and that the said second party has done and performed his said contract in every particular, and upon a showing made that there are outstanding no claims by reason of work performed, or material furnished, which could be made the basis of a lien upon the said building, said first party agrees to pay to said second party the balance remaining due and unpaid on said contract to said second party. It is further agreed that should there be any claims outstanding on account of labor performed, or material furnished, which might be made the basis of a lien upon said building, said first party shall have the right to retain, out of any payment due or thereafter to become due, an amount sufficient to discharge such claims or obligations. And should there prove to be any such claims, after all payments are made, the said second party shall refund to the first party all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of said second party's default."

The trial court found, and there is evidence to support the findings, that the building was completed; that the architect in charge thereof had issued, in good faith, his final certificate to the effect that the building had been completed in accordance with the contract, and that respondents had fully performed the contract, and that there

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Opinion Per MOUNT, C. J.

was still due the respondents thereon the sum of \$3,988 (this amount did not include extras for which a separate allowance was made); that thereupon respondents made a showing to appellants that there were no claims outstanding which could be made the basis of a lien upon the said building, and exhibited receipts and vouchers for all labor performed and materials furnished for said building to and for said respondents, showing that said materials and labor were fully paid for. This was certainly all that was required of the respondents, under the provisions of the contract, to show that the balance of the contract price was then due.

It is alleged in the answer of appellants that the Washington Cornice Company had filed a lien upon the building for materials and labor furnished in the construction of the building, claiming a balance due of \$799.90. The answer does not state when this lien was filed, but it appears to have been filed after the respondents' action was commenced. Appellants, upon filing their answer, moved the court to require the respondents to make the Washington Cornice Company a party to this action. This motion was denied, and, we think, correctly so, because the statute, at Bal. Code, § 5910, provides that all persons who *prior to the commencement of the action* have filed lien claims against the same property shall be joined as plaintiffs or defendants. Those who file claims of liens subsequently, of course cannot be made parties. Subsequent lien claimants, by the terms of the statute, are not permitted to bring an independent action. They must apply to the court to be joined as parties thereto by way of intervention. The Washington Cornice Company did not so apply.

Numerous errors are alleged in the instructions given by the court to the jury. It is not necessary to consider these, because the only question which the jury passed upon was the appellants' liability upon the second cause of action.

This finding was in appellants' favor. The other questions are reviewable here *de novo*, and upon them we are satisfied with the findings of the lower court.

Respondents ask for a further allowance in this court for attorney's fees here. It has not been the practice of this court to allow independent attorney's fees in this court, in cases of this character. We think such allowances are more properly within the jurisdiction of the trial court, to be allowed at the time of the trial. Four hundred dollars was so allowed, and we think that amount was sufficient. The request is therefore denied.

There is no error in the record, and the judgment of the lower court is affirmed.

DUNBAR, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

57 600
40 200

[No. 5229. Decided March 23, 1905.]

PHILLIPS MORRISON, *Appellant*, v. J. B. BERLIN *et al.*,
Respondents.¹

JUDGMENT—VACATION—COLLATERAL ATTACK UPON SUBSEQUENT JUDGMENT AFTER VACATING VOID DECREE. Where a default judgment is, on motion of the plaintiff, found to be fraudulently entered and void, it may be vacated and a new judgment entered in accordance with the demand of the complaint, without notice to the defendants; and, upon a collateral attack, the subsequent judgment will be presumed to have been made on sufficient showing, nothing appearing to the contrary in the record.

QUIETING TITLE—PLEADINGS—COMPLAINT—SUFFICIENCY AS TO PART OF LOT—DEMURRER. In an action to quiet title to a lot, sold under a tax foreclosure which was alleged to be void, it is error to sustain a general demurrer to the complaint upon its appearing by a bill of particulars that the tax foreclosure was valid, where the tax deed covered only a portion of the lot.

¹Reported in 79 Pac. 1114.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for King county, Bell, J., entered April 2, 1904, dismissing an action to quiet title, upon sustaining a demurrer to the complaint. Reversed.

Charles E. Patterson, for appellant.

John G. Gray, for respondents.

FULLERTON, J.—The appellant brought this action under Bal. Code, § 5500, to recover the possession of lot 18, in block 25, of the city of West Seattle, and to remove clouds from and quiet his title thereto. In his complaint he alleged, in substance, that he was the owner, and entitled to the possession, of the lot mentioned, and that the respondents, by themselves and their tenants, were wrongfully in possession of the same, claiming title thereto adversely to him; that they claimed title thereto by virtue of a sale in a tax foreclosure proceeding, which sale was void; and that he had demanded possession of the lot, and had tendered to the respondents the amount of taxes, penalties, interest and costs paid by the purchaser at the sale of the lot in such proceeding. In response to a demand for a bill of particulars, the appellant set out the record of a tax foreclosure proceeding, from which it appeared that the east one hundred and ten feet of the lot had been sold, under a decree obtained in a proceeding brought to foreclose a certificate of delinquency, issued by the county for delinquent taxes. On the filing of this bill of particulars, the respondents demurred to the complaint, which demurrer the trial court sustained, and, on the refusal of the appellant to plead further, entered a judgment dismissing his action.

From the bill of particulars it appears that the appellant was served personally in the tax foreclosure proceeding, and made default therein, and that the court, after

the time for answering had expired, entered what on its face purported to be a judgment foreclosing the certificate. Later on it entered another judgment in the same proceeding, in which it found that the first judgment was fraudulently entered, was void and of no effect, and that the plaintiff in that proceeding was entitled to have the same vacated. The judgment was thereupon adjudged to be vacated, and a new judgment entered according to the demand of the complaint. It was on this last judgment that the east one hundred and ten feet of the lot in question was sold, and through which the respondents derive such title to the property in question as they have.

The appellant contends that the judgment is erroneous for two reasons: (1) that the tax foreclosure proceedings show that the judgment entered therein is void; and (2) that the complaint states a good cause of action for the recovery of all that part of the lot other than the east one hundred and ten feet. In support of the first proposition the appellant argues that the entry of the first judgment exhausted the powers of the court; that it was a binding judgment, and an end to the litigation; and that the court could not thereafter enter another valid and binding judgment in the same action; and hence the sale under the latter judgment, through which the respondents claim title, was void and passed no title. It is undoubtedly a general rule that the entry of one judgment in an action or proceeding bars the court from entering another, so long as the first remains on the record not vacated nor reversed, but the rule has reference to a valid judgment. If for any reason the first judgment is void, and of no effect, there is no objection to the court's subsequently entering a valid judgment in the action or proceeding, though the first might remain on the record unchallenged. But here the court found the first judgment void, and declared the same vacated at the time it entered its second judgment. It is

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Opinion Per FULLERTON, J.

true it did this without further notice to the appellant, and without anything appearing on the face of the record to indicate that the first judgment was void, but this is no reason for declaring its action in entering the second judgment of no effect. The appellant is attacking the proceedings collaterally, and all intendments are in favor of their regularity; and, inasmuch as the court found that the first judgment was void and should be vacated and set aside, we must presume that its finding is based upon sufficient cause, since nothing appears to the contrary. And, of course, if the first judgment was void, the court could set it aside without notice to the respondent, either on motion of the plaintiff in that action, or its own motion, and could enter up a valid judgment against the plaintiff, so long as it did not exceed the relief warranted by the allegations of the complaint.

As to the second objection, we think there can be no question, that a cause of action is stated in the complaint for the recovery of the portion of the lot not included in the east one hundred and ten feet thereof. Apart from the bill of particulars, the complaint contained all of the essential allegations of a good complaint in ejectment to the whole lot, and, although the bill of particulars did show that these allegations could not be established as to the east one hundred and ten feet of the same, the court was not justified in sustaining a demurrer thereto. The appellant is not to be denied the right to recover that to which he is justly entitled simply because he claims too much; and the court should have overruled the demurrer, and compelled the respondents to answer as to their possession and claims to that part of the property not included in the foreclosure sale.

We are aware that the respondents seek to justify this part of the court's ruling by the claim that the appellant did not specially call the court's attention to the fact that

the tax foreclosure sale did not include the whole lot; but there is nothing in the record to substantiate this claim, much less is there anything showing actual deceit, which alone would justify us in affirming a judgment under the circumstances shown here. The respondents seem to forget that they were the demurrants, and of themselves owed a duty to the court not to make their claims broader than the facts warranted.

For the error last indicated, the judgment is reversed, and the cause remanded for further proceedings.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5127. Decided March 23, 1905.]

VICTORIA L. TRUMBULL *et al.*, Appellants, v. JEFFERSON COUNTY *et al.*, Respondents.¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. Where, pending an appeal from an order refusing to enjoin a tax foreclosure sale, appellant pays the tax judgment, the appeal will be dismissed, since there is no longer any controversy, regardless of the fact that plaintiff was refused a supersedeas on appeal and was compelled to redeem in order to save the property.

SAME—LITIGATION OF COSTS BY SURETIES. The rule that the supreme court will not entertain an appeal to determine a matter of costs, does not apply to sureties upon a cost bond against whom judgment for costs has been rendered, appeal lying in their behalf from such judgment.

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. In actions of equitable cognizance, the supreme court has jurisdiction on appeal irrespective of the amount in controversy.

JUDGMENT—JURISDICTION—DIRECT ATTACK. Upon a direct appeal from a judgment, jurisdiction must appear on the face of the record.

¹Reported in 79 Pac. 1105.

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Opinion Per Curiam.

COSTS—SURETIES ON NONRESIDENT'S COST BOND—JUDGMENT AGAINST. Upon entering judgment against a nonresident plaintiff, the court is without jurisdiction to enter judgment for costs against sureties upon the cost bond, and such a judgment is a nullity.

APPEAL AND ERROR—DECISION—COSTS. Where an appeal is affirmed as to part, and reversed as to part, of the appellants, and only one brief was filed, the respondents will be allowed one-half of their costs, and the successful appellants one-half of their costs.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered January 9, 1904, dismissing an action to enjoin a tax sale, upon sustaining a demurrer to the complaint. Appeal dismissed as to appellant Trumbull. Reversed as to sureties.

Trumbull & Trumbull, for appellants.

J. M. Ralston and A. W. Buddress, for respondents.

PER CURIAM.—On the 10th day of October, 1903, a judgment foreclosing a certificate of delinquency was duly entered in the superior court of Jefferson county, in a certain action therein pending wherein said Jefferson county was plaintiff, and the plaintiff herein and others were defendants. The amount of the tax judgment was \$116.43, and \$2.80 costs. This judgment was certified to the county treasurer as required by law. On the 14th day of December, 1903, the county treasurer gave notice that he would sell the property described in the tax judgment on the 26th day of the same month, to satisfy the full amount of taxes, assessments, penalties, interest, and costs adjudged to be due thereon, as follows: amount of the judgment, \$119.23; interest, \$3.77; accrued costs, \$3. The notice further stated that the purchaser would be required to pay subsequent taxes on the property described in the tax judgment, for the years 1898, 1899, 1900, 1901, and 1902, respectively, making the total amount for which

the property would be sold the sum of \$437.71. This action was brought by the owner of the property to enjoin the sale for any amount in excess of the amount stated in the original judgment.

The plaintiff was a nonresident, and the appellants Fred E. Cook and T. F. Trumbull executed a cost bond in her behalf. A temporary injunction was granted without notice, and at the hearing the court sustained a demurrer to the complaint. The plaintiff elected to stand on her complaint, and refused to plead further; whereupon the court dismissed the action, and entered a judgment against the plaintiff, and also against the sureties on her cost bond, for the costs in the action. A motion to vacate the judgment for costs, as against the sureties on the cost bond, was thereafter interposed and denied. On the 16th day of January, 1904, the plaintiff in this action and the sureties on the cost bond gave notice of appeal to this court. On the 23d day of January, 1904, the appellant Victoria L. Trumbull paid to the treasurer of Jefferson county the sum of \$124.08, in full satisfaction of the tax judgment heretofore mentioned, and received a certificate of redemption. From the judgment of dismissal and for costs, the plaintiff and the sureties on the cost bond have appealed to this court.

The respondents moved to dismiss the appeal upon several grounds stated in their brief. The first two grounds of the motion are, (1) because there is no longer any real controversy in this cause, and (2) because the court will not litigate a mere question of costs. This motion must be granted as to appellant Victoria L. Trumbull. The tax judgment which the respondents were threatening to execute has been satisfied by her, and the injunction prayed would be of no avail if granted. As said by the supreme court of the United States in *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293:

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Opinion Per Curiam.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

To the same effect are the decisions of this court. *State v. Wickersham*, 16 Wash. 161, 47 Pac. 421; *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *Campbell v. Hall*, 28 Wash. 629, 69 Pac. 12.

In opposition to the motion to dismiss on the above grounds, appellants cite *Hartson v. Dale*, 9 Wash. 379, 37 Pac. 475. That was an action to enjoin the payment of a county warrant, on the ground of its illegality. A demurrer to the complaint was sustained, and the plaintiff stood on the complaint, and appealed from the order of dismissal. After the appeal was perfected, the county treasurer, who was one of the respondents, paid the warrant in controversy, and set this fact up by affidavit for the purpose of defeating the appeal. This court properly held that a respondent could not thus defeat an appeal and avoid the payment of the costs incident thereto. But this rule does not apply to the appellant.

Counsel for Victoria L. Trumbull maintain that this rule should not apply to her for the reason that she was denied a supersedeas, by the trial court and by this court, and was compelled to satisfy the judgment to save her property. The reasons which may have induced her to satisfy the judgment are not material. The fact remains that any judgment this court, or the court below, might render or enter upon the merits would be wholly ineffectual for any purpose. The question at issue has become a mere abstract proposition, in a decision of which the appellant Victoria L. Trumbull has no interest, and the court will not decide it merely to satisfy her curiosity or that of her

counsel. This court will not permit a mere question of costs to be litigated by the parties to an action. *State ex rel. Scottish-Am. Mtg. Co. v. Meacham*, 17 Wash. 429, 50 Pac. 52. It follows that the appeal must be dismissed as to the appellant Victoria L. Trumbull.

On the 4th day of June, 1904, this court refused to dismiss the appeal in this case, on the above and other grounds, without an opinion. The motion was then denied, for the reason that the appeal could not be dismissed as to all the parties, and the court refused to hear the appeal by piecemeal. The respondents further move to dismiss the appeal as to all the parties, on the second ground above stated, and upon the further grounds that the court has no jurisdiction because the amount in controversy is less than \$200, and because no appeal will lie by the sureties on the cost bond. The rule that a court will not entertain an appeal to determine a mere matter of costs only applies to the parties to the action, and does not apply to third persons, against whom a judgment for costs has been rendered. *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105. The same cases hold that an appeal will lie in behalf of the sureties, and that a judgment such as was rendered in this case against the sureties on the cost bond is void. This was an action of equitable cognizance, and the jurisdiction of this court does not depend on the amount in controversy. Nor does the smallness of the amount involved, or the insolvency of the sureties, affect their right to have a void judgment against them reversed.

The respondents further contend that the judgment against the sureties cannot be assailed in this action, as the want of jurisdiction does not appear on the face of the record, and there is no statement of facts. The authorities cited are all cases of collateral attack, and have no application to a direct appeal from a void judgment. On a di-

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rect appeal the jurisdiction of the court must appear on the face of the record, while in this case a want of jurisdiction clearly appears, and the judgment of the court is, therefore, a nullity. This disposes of all the questions discussed.

The appeal will be dismissed as to appellant Victoria L. Trumbull, and the judgment is reversed as to the appellants Fred A. Cook and T. F. Trumbull. Inasmuch as all the parties appear by the same counsel, and file but one brief, the respondents will recover one-half the costs on this appeal from the appellant Victoria L. Trumbull and the sureties on the appeal bond; and the appellants Fred A. Cook and T. F. Trumbull will recover the other half of the costs from the respondent Jefferson county.

[No. 5260. Decided March 23, 1905.]

FRANK B. POOR, *Respondent*, v. EDWARD CUDIHEE *et al.*,
Appellants.¹

APPEAL—REVIEW—STATEMENT OF FACTS IN HABEAS CORPUS—EXCEPTIONS. Upon an appeal from an order of discharge on a writ of habeas corpus, where the evidence was not brought up by a statement of facts and no exceptions were taken to the findings, the only question for review is whether the findings support the judgment.

EXTRADITION—FUGITIVE FROM JUSTICE—HABEAS CORPUS. A prisoner held under an extradition warrant is entitled to a discharge on a writ of habeas corpus where it appears that he is not a fugitive from justice.

Appeal from an order of the superior court for King county, Bell, J., entered January 4, 1904, discharging a prisoner on a writ of habeas corpus. Affirmed.

¹Reported in 79 Pac. 1105.

W. T. Scott and C. S. Gleason (Peters & Powell, of counsel), for appellants, contended among other things, that the admission in the return that the petitioner was about the city of New York for two years, when he came to Seattle, is all that is necessary to make him a fugitive from justice. *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291; *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. 706, 60 L. R. A. 774; *In Matter of Voorhees*, 32 N. J. L. 141; *In re White*, 55 Fed. 54; *In re Keller*, 36 Fed. 681; *In re Strauss*, 126 Fed. 327.

C. H. Farrell and McCafferty & Kane (J. W. Robinson, of counsel), for respondent. Where the petitioner is not a fugitive from justice he cannot be held and the question is one of fact. U. S. Revised Statutes, § 5278; Spear, Extradition, p. 388; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291; *Leary's Case*, 6 Abb. New Cas. (N. Y.) 43; 2 Moore, Extradition, p. 954; *Hibler v. State*, 43 Tex. 197; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148; *Hyatt v. People ex rel. Corkran*, 188 U. S. 691, 23 Sup. Ct. 456; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544. The action of the executive is not conclusive on the courts. *In re Foye*, 21 Wash. 250, 57 Pac. 825; U. S. Revised Statutes, § 5278; *In re Baker*, 21 Wash. 259, 57 Pac. 827; *In re Sylvester*, 21 Wash. 263, 57 Pac. 829; *Ex parte Slauson*, 73 Fed. 666; *Ex parte Hart*, 63 Fed. 249, 28 L. R. A. 801.

PER CURIAM.—On the 27th day of November, 1903, a petition for writ of habeas corpus was presented to this court by one Frank B. Poor, alleging that said Poor was illegally restrained of his liberty by one Cudihee, as sheriff of King county, in this state, and by one Carey, claiming to be an agent of the state of New York. The alleged cause

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of said restraint was a certain pretended extradition warrant, issued by the Governor of the state of Washington, upon the demand of the Governor of the state of New York, authorizing the said Carey to take the said Poor, wherever he might be found in the state of Washington, and transfer him to the line thereof, at the expense of the state of New York. Among other grounds of illegality in the restraint, it was averred that the said Poor was not a fugitive from the justice of the state of New York. The writ issued and was made returnable on the 30th day of November, 1903, before the Hon. W. R. Bell, one of the judges of the superior court of King county. A return was made to the writ in the superior court, but for some reason the return was never filed. A hearing was had on the petition for the writ, the return thereto, and the traverse to the return. Upon such hearing the petitioner was discharged from custody, and from the order of discharge this appeal is taken.

There is no statement of facts or bill of exceptions, and no exceptions were taken to the findings of the court. In this state of the record, under the uniform rulings of this court, the only question open to review is the sufficiency of the findings to support the judgment. The court found, among other things, that the petitioner was not a fugitive from justice. Assuming, as we must, that such was the fact, the petitioner was entitled to his discharge. *In re Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *Wilcox v. Nolze*, 34 Ohio St. 520; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones & Atkinson v. Leonard*, 50 Iowa 106, 32 Am. Rep. 116; *Ex parte Knowles*, 16 Ky. Law 263; *People ex rel. McCoy v. Warden of City Prison*, 3 N. Y. Cr. R. 370; *Commonwealth v. McCandless*, 7 Pa. Co. Ct. R. 51.

The order is therefore affirmed.

[No. 5148. Decided March 24, 1905.]

A. C. KALBERG, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.¹

CARRIERS—STREET RAILWAYS—NEGLIGENCE AS TO TRACKS—CONTRIBUTORY NEGLIGENCE OF PASSENGER IN CROSSING TRACK AT IMPROPER PLACE. One who alights at a street car platform, and attempts in the dark to cross the tracks diagonally at a point where they were raised above the level of the ground, and where there was no dedicated or worked roadway, must be held to be guilty of contributory negligence in tripping on the street car rail, where she is familiar with the place and dangers, and there was another way by a planked crossing which she could, and sometimes did, use to cross the tracks to her home.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 10, 1903, upon findings in favor of the plaintiff, after a trial before the court, a jury being waived, in an action for personal injuries sustained in tripping upon a street car rail. Reversed.

Hughes, McMicken, Dorell & Ramsey, for appellant.

Carkeek & Childe, for respondent.

MOUNT, C. J.—Action for personal injuries. This cause was tried to the court below without a jury. A judgment for \$500 was rendered in favor of respondent, from which this appeal is prosecuted.

The facts are not disputed, and are substantially as follows: Appellant maintains and operates an electric street railway between the business part of the city of Seattle and Green Lake, a suburb of said city. This line runs over Woodland Park avenue, in said city, which avenue lies north and south. Forty-first and Forty-second streets run east and west, and intersect Woodland Park avenue at right

¹Reported in 79 Pac. 1101.

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angles. North of Forty-first street, only the western half of Woodland Park avenue has ever been platted, or dedicated to the city or to the public, and no part of this avenue north of Forty-first street has ever been graded or improved.

On January 13, 1903, appellant maintained a double track railway along the said avenue, under and in pursuance of a franchise granted by the city. The tracks were constructed in the manner required by the franchise, and by the board of public works of said city. These tracks were so constructed that the ends of the ties on each side thereof were exposed, and above the surface of the ground and the dedicated portion of the street. The rails rested upon said ties, and extended wholly above the surrounding ground. The space between the rails of each track was partially filled to the level of the ties. Appellant maintained a plank platform on the west side of its western track, at the intersection of Forty-second street, for the convenience of passengers. Forty-second street, at its intersection with the avenue on the east side, was about fifty feet to the north of the intersection on the west side, thus making a turn in the street. At the point of this turn there was a plank crossing over said railway tracks. While the city had never graded or improved said Woodland Park avenue, the public have been accustomed to drive along the said avenue on the west side of appellant's tracks as far north as Forty-second street, where persons using the street cross the track by the planked crossing.

Respondent, for several months, had lived at a house on the east side of said avenue, and a little southeast of the platform above named, in plain view thereof, and was accustomed, during said time, to go back and forth on said street car line, to and from the business part of said city of Seattle, both by day and by night. On her return from the city, she sometimes proceeded directly across the track

from said platform, toward the house where she lived; at other times she proceeded north to the planked crossing, thence across the tracks to the east side thereof, and thence south to her house. The latter was about seventy-five or one hundred feet further, but was a safer way. To go directly from said platform to the house where respondent lived required respondent to cross both railway tracks diagonally, and rendered it necessary for her to step over the rails and the ends of the ties supporting them.

On the 13th of January, 1903, between nine and ten o'clock at night, respondent alighted from appellant's car on its platform, on the west side of its tracks at Forty-second street, and, as soon as the car had passed by, she proceeded diagonally across said street car tracks directly toward her house. The night was dark. Respondent had no light, and there was no light after the car had passed, except a light in the window of respondent's house. In crossing the said railway tracks, respondent tripped on the eastern rail on the eastern track and fell, striking her wrist, causing a Colles' fracture thereof. The lower court concluded, from the above facts, that the respondent was not guilty of contributory negligence.

We cannot concur in this view. The point where respondent attempted to cross the tracks was not a public crossing. No part of the street east of the platform toward respondent's house had ever been used as a street or public thoroughfare, except by the street car company for its own cars. The street was in its natural state, ungraded, unimproved, and unused. The respondent was familiar with all of the surroundings, and the condition of the tracks, and the danger of attempting to cross them at that place in the dark. She also knew that there was another way, but a trifle further, by which she could have avoided the obstruction. In endeavoring to cross these tracks at

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that place in the dark, under these circumstances, she must be held to have been guilty of contributory negligence, under the rule adopted by this court in *Reynolds v. Northern Pac. R. Co.*, 22 Wash. 165, 60 Pac. 120, and *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340, 53 Pac. 345.

The case of *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114, apparently relied upon by respondent, was a case where the walk was a public way, used by persons desiring to travel it, both before and after the injury. We there held that the question of contributory negligence was a question for the jury, for the reason that knowledge of the defective condition of the walk did not *per se* establish negligence. We think that case is distinguishable from the present case, from the fact that the place where the respondent attempted to cross the railway track in this case was not a public way, and was not used as such, and that, therefore, when respondent attempted to cross the tracks in an unusual way in the dark, knowing the condition, she necessarily contributed to her own injuries.

The judgment of the lower court is therefore reversed, and the cause dismissed.

DUNBAR, FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5412. Decided March 24, 1905.]

GEORGE E. MACMARTIN *et al.*, Appellants, v. GEORGE W. STEVENS *et al.*, Respondents.¹

SALES—GOOD WILL—ENGAGING IN OPPOSITION BUSINESS—SOLICITING FORMER CUSTOMERS—CONTRACTS. Where plaintiff's co-partners in a laundry business sold out to him their interests by bill of sale in the usual form, which contained no provisions respecting good will, and no contract to forbear to prosecute the same business, or to solicit patronage, the vendors cannot be enjoined from entering into an opposition business and soliciting the old customers to deal with them, since the rights of the parties are fixed by the terms of the contract.

SAME—PLEADING—COMPLAINT—DEMURRER—FACTS NOT WELL PLEADED. In an action on a contract of sale of a laundry business, an allegation in the complaint that the good will of the business was the chief consideration, is a mere conclusion of law, in view of the express terms of the contract containing no such provision, and is not admitted by a demurrer.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 11, 1904, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. Affirmed.

H. H. Johnston and *T. W. Hammond*, for appellants. The good will passed without specific mention, as part of the business capable of producing a profit. *Wilmer v. Thomas*, 74 Md. 485, 22 Atl. 403, 13 L.R.A. 380; *Lane v. Smythe*, 46 N. J. Eq. 443, 19 Atl. 199; *Fite v. Dorman*, (Tenn.) 57 S. W. 129; 2 Bates, Partnerships, § 663. And in such a case, injunction is the proper remedy to prevent the vendor from making use of his former connection. *Trego v. Hunt*, [1896] App. Cas. 7; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Althen v. Vreeland* (N. J. Eq.), 36 Atl. 479; *Wentzel v. Barbin*, 189 Pa.

¹Reported in 79 Pac. 1099.

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St. 502, 42 Atl. 44; *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720; *Zanturjian v. Boornazian* (R. I.), 55 Atl. 199; *Angier v. Webber*, 14 Allen 211; *Dwight v. Hamilton*, 113 Mass. 175; *Munsey v. Butterfield*, 133 Mass. 492; *Richardson v. Westjohn*, 6 Ohio Dec. 1043; *Burckhardt v. Burckhardt*, 36 Ohio St. 261; *Knoedler v. Glaenzer*, 55 Fed. 895; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545; *Mattingly Co. v. Mattingly*, 96 Ky. 430, 27 S. W. 985.

Campbell & Powell, for respondents, cited: *Story*, Partnership, § 99; *Howe v. Searing*, 19 How. Prac. (N. Y.) 14; *Cottrell v. Babcock etc. Co.*, 54 Conn. 122, 6 Atl. 791; *White v. Jones*, 1 Abb. Prac. N. S. 328; *Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362; *Longshore etc. Pub. Co. v. Howell*, 26 Ore. 527, 38 Pac. 547.

DUNBAR, J.—Action to enjoin interference with the customers of a laundry. A general demurrer to the complaint was sustained, and the action dismissed. Plaintiffs appeal.

The complaint alleges, in substance, that the plaintiffs were engaged in the laundry business in the city of Tacoma, under the name of the Standard Steam Laundry; that the defendants, George W. Stevens and Edith Moon, had at different times been copartners in said business, had sold their respective interests to the plaintiffs, and afterwards formed a partnership, leased a laundry plant known as the Cascade Steam Laundry, and started in at once to solicit customers from those of the plaintiffs. It is alleged, among other things, that they induced one of the drivers of plaintiffs to leave the Standard and enter the employment of the Cascade, and thereafter drive over his old route and solicit the customers with whom he had become acquainted; that by this means they had succeeded in persuading many of the customers of the plaintiffs to

deal with the Cascade laundry instead of the Standard, and were engaged in persuading others to do the same thing; that, unless restrained by the court, they would continue to solicit the customers of the plaintiffs, and interfere with the business of the Standard Steam Laundry, to the irreparable injury of the plaintiffs. The acts are set forth more in detail, but we think this is sufficient to serve all purposes in discussing the case.

The agreement of sale of defendant Edith Moon was entitled, "Bill of Sale," and, after the formal portion of the article, proceeds as follows:

"Do by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators, and assigns, the following goods, chattels, and property, to wit: an undivided half interest in and to the Standard Steam Laundry plant [describing it]; first parties' interest in and to any policy or policies of insurance on any of said plant or property making up same; one hydraulic washer, now stored in this city at 15th and O streets; also, four horses and three wagons, and harnesses; also, all goods and merchandise or machinery in transit purchased by the Standard Steam Laundry. . . . The intention of first party, Edith Moon, . . . being by this bill of sale to sell and convey to second party all her interest in and to said Standard Steam Laundry, and the personal property connected and used therewith, whether same is in the building or outside thereof, where said business is carried on, except her interest in and to accounts and bills receivable due for past business;"

agrees to give possession, etc.; and warrants the title to the property sold. The bill of sale of defendant Stevens is essentially the same.

We think the demurrer was properly sustained. This is an action on a contract. The contract seems to be a simple one, viz., the sale of certain specific property. There is no contract to forbear entering into the same business in the same neighborhood, or to forbear conducting an opposition

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business in any manner whatever. There is no contract not to solicit. The plaintiffs' rights must be determined by what is contained in the contract, either by express provision or by plain implication, and we are unable to see that the contract set forth bears any implications whatever. The markets of this country are open to all who desire to seek them, no matter what character of commodity they are offering for sale. There is no exclusive right of sale given by law to any one, and, unless the citizen contracts away this right, he will be protected in it. It is, no doubt, true that a case of conspiracy might be shown where parties had conspired for the purpose of injuring one's business. But that would be so whether the conspirators had sold their interests in the business to the complainant or not. Strangers to the business would be as liable under such circumstances as those who had once been partners in the business. It is an easy matter, in a case of this kind, if the good will of the business is disposed of, or if there is an agreement on the part of the parties to the contract to forbear to prosecute the same kind of a business, or to solicit the patronage of the public at large or of the customers of the established business which they are selling, to incorporate that agreement in the contract. But, unless it is incorporated, a plain contract of sale cannot be construed into a contract to relinquish rights which are not expressed, or the relinquishment of which is not implied. As is well said by the respondent:

"If these bills of sale are to be construed to contain such covenants as is claimed by appellants, it would be necessary for further construction as to how long they were to continue, and when they would end, whether in a week, a month, or a year, or whether there would be a perpetual injunction on the right of the seller to establish a like business with a right of solicitation."

It is true, it is alleged in the complaint that the good will

was the most valuable part of the business, and the retiring partners, selling all their interests in the firm and being paid therefor, sold everything connected with the business capable of producing a profit; hence, inevitably, the good will passed. But the demurrer admits only the facts which are well pleaded, and this is simply a conclusion of the pleader, while the bill of sale upon which the affidavit is based does not warrant the conclusion asserted in the affidavit.

We think no error was committed by the court in sustaining the demurrer. The judgment is therefore affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5302. Decided March 24, 1905.]

JOHN L. DIRKS, *Appellant*, v. GEORGE H. COLLIN, *as*
Commissioner of Spokane County, et al.,
Respondents.¹

RECORDS—COUNTIES—ABSTRACTS OF TITLE—POWER TO EXPEND PUBLIC MONEY IN KEEPING TRACT INDICES. The legislature having prescribed a system of indices of public transfers, and made it the duty of county auditors to keep the same, the county commissioners have no authority to expend public money in keeping a different system of "tract indices," even when voluntarily done by the auditor's deputies, regardless of their public utility or the fact that money can be saved thereby, since the judgment of the legislature is paramount.

SAME—COUNTY AUDITORS—PUBLIC ABSTRACTERS. Bal. Code, §§ 417, 418, was not intended to make the county auditor a public abstracter to the extent of requiring him to make a complete list of all transfers affecting particular tracts, and the keeping of "tract indices" is not justified by said statute.

COUNTIES—UNLAWFUL EXPENDITURE OF PUBLIC MONEY—INJURY TO TAXPAYER PRESUMED. It cannot be objected to a suit by a

¹Reported in 79 Pac. 1112.

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taxpayer to enjoin the unlawful expenditure of public money that he is not damaged for the reason that money is thereby saved to the county, since injury is conclusively presumed from the unlawful expenditure of public money.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 31, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to enjoin the keeping of tract indices by a county. Reversed.

E. C. Macdonald, for appellant, cited: *Snohomish Abstract Co. v. Anderson*, 9 Wash. 349, 37 Pac. 471; *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195; *Sturgeon v. Hampton*, 88 Mo. 203; *Alderson v. St. Charles County*, 6 Mo. App. 420; *Miller v. Sullivan*, 32 Wash. 115, 72 Pac. 1022.

Horace Kimball and *Miles Poindexter*, for respondents, cited: *Mechem, Public Officers*, §§ 741, 945; 23 Am. & Eng. Ency. Law (2d ed.), 364; 16 Id. 356, 357, 360; 10 Id. (1st ed.), 783, 802; *Rand, McNally & Co. v. Hartmanft*, 29 Wash. 591, 70 Pac. 77.

MOUNT, C. J.—This action was brought by a taxpayer to enjoin the respondents, as county officers of Spokane county, from keeping in the auditor's office, at public expense, a set of books known as "Tract Indices," upon the ground that such books were not authorized by law. Upon the trial of the case, the court below found that the county auditor kept and maintained such a set of books at public expense, but also found that such books were a public utility, and that their abolishment would make more expense to the county than the maintenance of the books. The court therefore concluded that the maintenance of the tract indices is not an injury to the appellant, and dismissed the action. The appeal is from this order.

In the case of *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195, where a contract had been entered into by the board of county commissioners of King county for the preparation of tract indices, such as the ones kept by Spokane county now in question, we held that the county board had no authority to enter into such a contract, because the legislature had provided for the kind of indices to be kept by the county auditor in his office, and there was no authority for a different method to be prepared or kept at public expense. In the course of that opinion, speaking to this point, we said, at page 635:

"It is not reasonable to suppose that when the legislature so carefully described the system that should be followed by county auditors, and which should be uniform throughout the state, it at the same time intended to authorize county commissioners to expend large sums to maintain other and different systems. The fact that a certain mode or method has been expressly designated by the legislature we think excludes the idea that a different mode or method may be pursued. The legislature has not only prescribed the method, but has expressly made it the duty of the county auditor to follow it, and this we think negatives the idea that another method may be pursued at public expense by authority of the county commissioners. The new method may be more convenient and more in accordance with the enlightenment and enterprise of the times, but, until the legislature has authorized its adoption and conferred upon county commissioners the power to expend public money for that purpose, we think it must be held that it is beyond their power to so expend the county's funds."

We think that case is conclusive of the question presented on this appeal.

Counsel for respondents contend, however, that, under the provisions of Bal. Code, §§ 417 and 418, which are as follows:

"§ 417. The auditor must, upon the application of any person, and upon the payment or tender of the fees there-

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for, make searches for conveyances, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour, and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded.

"§ 418. If any county auditor to whom an instrument, proved or acknowledged according to law, or any paper or notice which may by law be recorded, is delivered for record, . . . 4. Neglects or refuses to make the searches and to give the certificate required by this chapter; or if such searches or certificate are incomplete and defective in any important particular affecting the property in respect to which the search is requested; . . . He is liable to the party aggrieved for the amount of damage which may be occasioned thereby;"

the county auditor is a public abstractor, and that it is his duty to furnish abstracts of title on application, and that these tract indices are essential for that purpose. The same argument was made in the case of *Smith v. Lamping, supra*, but was not then noticed, because we said that, when the legislature adopted a system which should be followed, it excluded the idea that some other or better system might be adopted by the county officers. We think the sections above quoted were not intended to make the county auditors public abstracters, to the extent of requiring them to make a complete list of all liens and all transfers affecting particular pieces of land upon demand therefor; but rather were intended to require the auditor to search for certain instruments to which his attention is specifically directed by the applicant; and if such instruments are recorded or filed in his office, to certify as provided in § 417. Respondents seek to distinguish this case from *Smith v. Lamping*, by reason of the fact that the indices in this case

are already prepared and are in use, and by reason of the further fact that in the *Smith* case the county commissioners were proceeding to have the indices prepared over the objection and protest of the county auditor; while here the county auditor is caring for the indices voluntarily by his regularly appointed deputies. We think there is no merit in these distinctions, because we decided the *Smith* case upon the principle that the legislature had provided what indices should be kept by the county auditor and other county officers, and the judgment of the legislature is paramount upon the question.

Respondents further contend that the judgment should be affirmed, because the trial court found that appellant was not injured by the keeping of these tract indices, for the reason that the cost of maintaining them is less than the expense to the public would be if the indices were abolished. We cannot agree to this contention. It is conceded that it costs the county \$30 per month to keep up these indices. We have held that they are not lawfully maintained by the county or its officers. It follows that the money expended therefor is being paid out unlawfully, and that the taxpayers are injured. It will not do to say to a public officer that, because much money is saved by spending a little unlawfully, therefore the public is not injured. Injury to the taxpayers is conclusively presumed from the unlawful expenditure of public money.

The judgment appealed from is reversed, and the cause remanded to the lower court, with instructions to grant the relief prayed for.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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[No. 5386. Decided March 24, 1905.]

ALBERT O'CONNOR, *Appellant*, v. SOL. G. SIMPSON,
Respondent.¹

CONTRACTS — EMPLOYMENT — EVIDENCE — SUFFICIENCY — NONSUIT. In an action for services performed at the special instance and request of the defendant, there is sufficient evidence to put defendant upon his proof, and it is error to grant a nonsuit, where the undisputed evidence for the plaintiff tended to show that he was employed by one H as agent of the defendant to do the assessment work on mines in Alaska, owned by a corporation of which defendant was president and a stockholder, the defendant agreeing to advance the money therefor, that the appellant had worked for a considerable time under such employment, and there was evidence showing the value of the services, especially where the trial court did not question the credibility of the witnesses (Root, J., dissenting).

Appeal from a judgment of the superior court for King county, Morris, J., entered April 20, 1904, dismissing an action upon contract, at the close of plaintiff's testimony, after a trial before the court, a jury being waived. Reversed.

Cooley & Horan, for appellant.

Richard Saxe Jones, for respondent.

CROW, J.—This action was commenced by appellant, Albert O'Connor, against respondent, Sol. G. Simpson, to recover a sum alleged to be due for labor performed in doing certain assessment work, on certain mining claims on Tuttle Creek, in the District of Alaska, within the Arctic Circle, which claims were the property of the Cutter Bear Mining Company, a corporation. It is claimed by appellant that, at a meeting of the stockholders of said company, held in the office of respondent, in Seattle, Washington, it

¹Reported in 79 Pac. 1102.

appeared that said company did not have available funds with which to prosecute said assessment work, and that thereupon respondent, who was a stockholder and president of said company, directed and authorized one Hadley, another stockholder, to employ two men, and one Burkman to also employ two men, and to proceed with them to the properties via Nome, Alaska, and do the work, and that he, respondent, would furnish all supplies, would pay the expenses of the men from Nome to the mines and return, and would also pay their wages. It is claimed that, in pursuance of this authority, Hadley, as agent of respondent, employed appellant, who went to the Arctic Circle, and, with others who were under like employment, did the assessment work. The complaint alleges that the work was done by appellant at the special instance and request of respondent, who agreed to pay the reasonable value thereof, alleged to be \$700. The answer is a general denial.

Trial was had before the court without a jury. Appellant, having introduced his evidence, rested. Thereupon respondent moved for a nonsuit on two grounds: first, that there was no proof of any hiring of appellant on behalf of respondent; second, that there was no evidence on which the court could find any measure of recovery. The motion for nonsuit was granted, judgment was entered dismissing the action, and this appeal is taken.

We have carefully examined all of the evidence, as disclosed by the statement of facts, and are of the opinion that the court erred in granting the motion and dismissing the action. The evidence is too voluminous to repeat here, but we will say there was undisputed testimony of a number of witnesses tending to show that Hadley was the agent of respondent; that, as such agent, he employed appellant; that appellant worked for a considerable period of time under such employment; and we also think there was

competent evidence showing the value of his services. The learned trial judge, in announcing his reasons for granting the nonsuit, did not base the same on any suggestion whatever of want of credibility on the part of the witnesses; but, accepting the statement of the witnesses as true, seemed to regard the evidence as insufficient to make a case. The question here is not whether the evidence submitted was sufficient to have required the case to be submitted to a jury, had this been a jury trial, but whether it was clearly sufficient to entitle appellant to judgment, being undisputed and uncontradicted. We think that, in the absence of any evidence in rebuttal, appellant established his right to recover, and that he made a case sufficient to put respondent upon proof.

The judgment of the superior court is reversed, and the cause remanded, with directions to grant a new trial.

MOUNT, C. J., RUDKIN, and DUNBAR, JJ., concur.

FULLERTON and HADLEY, JJ., took no part.

ROOT, J. (dissenting)—I feel impelled to dissent from the conclusion announced in this case by the majority of the court. Hadley's agency was created solely by a conversation which occurred at the stockholders meeting, where respondent was present as president and stockholder of the corporation. All there present were stockholders, and they were discussing corporation business. When respondent then and there told Hadley to employ men to do this work, it is quite clear to my mind that he (respondent) was speaking *as an officer of said corporation*, and not in his *individual capacity*. All present were there for the express purpose of considering and dealing with affairs of the corporation. The fact that the corporation treasury was empty, and that respondent agreed to advance the corporation, or for its benefit, the money to pay for this

work, was a business matter between respondent and the corporation, but did not create any contractual relation between respondent (as an individual) and the men employed by Hadley. A man's language must be interpreted in the light of his surroundings, and with special reference to the subject matter under discussion. Sitting in the meeting with other stockholders and officers, and being there for the express purpose of dealing with corporation matters, was it not the natural thing for him to have spoken as such officer, rather than as an individual intending to bind himself personally? As such officer, he was speaking for the corporation, whose officers and stockholders were then and there present. I think the trial court was justified in believing that respondent, in his talk with Hadley, was speaking for the corporation, and not as an individual intending to bind himself personally. The assembled stockholders having arranged among themselves that respondent was to furnish the means to pay for the work, then proceeded to hire men to do the work. Because, in doing the latter, their spokesman happened to be the same officer (respondent) who had agreed to furnish the money, makes it no less the act and obligation of the corporation.

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[No. 5317. Decided March 25, 1905.]

87	629
41	295
41	408

THE INVESTMENT COMPANY, *Respondent*, v. A. HAMBACH
et al., *Appellants*.¹

STATUTES—RETROSPECTIVE EFFECT—EJECTMENT—BONA FIDE OCCUPANTS—ALLOWANCE FOR VALUE OF IMPROVEMENTS—MISTAKE IN BOUNDARIES. LAWS 1903, p. 262, for the protection of bona fide occupants of land who have, in good faith, made permanent improvements, has no retrospective effect, and cannot be taken advantage of by a defendant in ejectment who, by mistake in 1900, built the brick wall of his building upon plaintiff's adjoining lot; since at that time he was, at common law, a trespasser, and the rights of plaintiff then became vested.

Appeal from a judgment of the superior court for King county, Rudkin, J., entered May 12, 1904, in favor of the plaintiff, as prayed, upon sustaining a demurrer to an answer in an action of ejectment. Affirmed.

Fred H. Peterson (*H. C. Force*, of counsel), for appellants.

John P. Hartman, for respondent.

HADLEY, J.—This is an action in ejectment, brought to recover possession of a portion of lot 19, block 329, as shown upon the plat of the Seattle tide lands. The portion sought to be recovered lies along the northerly side of the lot. The defendants answered, admitting that the plaintiff is the owner of the whole of the lot. They affirmatively averred that, since about January 1, 1900, the defendants Hambach and wife have been the owners of lot 18, in the above mentioned block, which adjoins said lot 19 upon the northerly side of the latter; that about said date they employed a competent civil engineer to stake out the corners of said lot, and, he having done so, the

¹Reported in 80 Pac. 190.

said defendants thereupon constructed a one-story brick building upon the whole of lot 18, having reference to the boundaries so staked out, and believing that they marked the true boundary lines of said lot. The building was completed in the year 1900. It is further alleged that a subsequent survey was made by the city of Seattle, and by the plaintiff; whereupon it was claimed that the survey made on behalf of the defendants was incorrect, and that said Hambach and wife were in possession of a portion of lot 19, extending along the entire northerly side thereof. It is further averred that Hambach and wife occupied the said portion of lot 19 with the said brick building, and claimed title thereto adversely to plaintiff, holding possession thereof in good faith, believing at all times that they were its owners in fee. The answer also alleges that a brick wall, about eighteen inches wide, was erected by said defendants upon said strip of land, the value of which is \$1,000, and that the value of the land without the said improvement is \$250. The answer prays that the plaintiff may have such damages as it may be found to have sustained through the withholding of possession of said strip of land by the defendants, and that the defendants shall be allowed to set off the value of the improvements against the value of the land so occupied; and, further, that if the plaintiff shall fail to pay the value of the improvements, then the defendants shall be permitted to pay the value of the strip of land, and thereafter become the owners in fee simple.

The plaintiff demurred to the answer, on the ground that it does not state any cause of defense to the complaint. The demurrer was sustained. The defendants elected to stand upon their answer, declining to plead further, and the court thereupon found to the effect that, for nearly two years prior to the bringing of the action, the

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defendants had occupied said strip of land without lawful authority, and had withheld it from plaintiff, and that plaintiff had, at all times, been the owner and entitled to the possession. Judgment was entered that the defendants shall return and deliver said property to the plaintiff, free and clear of all buildings, structures, or other improvements placed thereon by defendants, and, in the event they shall fail forthwith to so vacate and return the property, then the sheriff of King county is directed to oust them, and to remove any such structures or improvements, at the expense of the defendants. The defendants have appealed.

Appellants in their brief say: "At common law the defense interposed would have been insufficient, for appellants would have been considered trespassers in so far as their building extended on to the lot of respondent." Thus conceding that at common law they are trespassers, they, however, contend that the defense alleged in their answer is within the provisions of the statute of 1903, as found at pages 262-3, Session Laws of that year, which is entitled as follows: "An act for the protection of occupants of land who have in good faith made permanent improvements or paid taxes or assessments thereon." The answer was carefully drawn with reference to that statute, and it is urged that the court erred in sustaining the demurrer to the answer. Assuming, without deciding, that the facts alleged with regard to the character of the improvements and the manner of occupancy may bring the case within the scope of relief contemplated by the statute, still we think there is another question that must be decisive of the case against appellants. The occupancy by appellants was begun, and the improvements were made, upon respondent's land in the year 1900. The statute did not go into effect until 1903. If the statute were intended to

apply to conditions antedating its existence, it would be retrospective in its operation.

"Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; . . ." *The Society etc. v. Wheeler*, 2 Gall. (U. S.) 105, Fed. Cas. No. 13,156.

The above definition of a retrospective law was written by Mr. Justice Story, and has since been recognized by the courts as a correct and comprehensive one. A statute should not be so construed as to make it impair existing rights, or create new obligations and duties with respect to past transactions, unless such plainly appears to have been the intention of the legislature.

"In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their literal extent to comprehend existing cases." Sutherland, Statutory Const., § 464, and cases cited.

Appellants concede that the act of 1903 does not, in terms, state that it was intended to be retrospective in its operation; but they argue that its language is broad enough to make it so. The language of the act may be easily read without giving to it such a construction, and, under the above stated rule, it should not be so construed. The act is not, therefore, retrospective.

If appellants' contention, that the act upon its face shows that it was intended to be retrospective, should prevail, it would nevertheless be of no avail to the defense in this action. The rights of the respondent with regard to this property were vested and established long before the statute took effect. If this statute were intended to affect such established and vested rights, it would be "opposed

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to those principles of jurisprudence which have been universally recognized as sound." 24 Am. & Eng. Ency. Law (2d ed.), 877, and cases cited.

The case of *Billings v. Hall*, 7 Cal. 1, was an action in ejectment. The defendant pleaded the "Settler Law" of 1856, and claimed the value of his improvements. Speaking of that act, the court said:

"It applies as well to past as future cases. That which, before, was mine, is by this act taken from me, either in whole or in part, for if I refuse to pay for the improvements which were put upon my land by a mere trespasser, and which were mine by the law, before the passage of the statute, I lose not only the improvements, but the land itself, and that which is mine today, may be taken from me tomorrow, by any intruder who wishes to enter upon it."

The court then quoted approvingly from *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547, as follows:

"Nothing can be more clear, upon principles of law and reason, than that a law which denies to the owner of land, a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions."

That statutes similar to ours should not be held to act retrospectively, so as to affect such vested rights as respondent's in the premises, was declared in the following cases: *Newton v. Thornton*, 3 N. M. 287, 5 Pac. 257;

Miller v. Moss (Tex.), 9 S. W. 257; *Wilson v. Red Wing School Dist.*, 22 Minn. 488; *Flynn v. Lemieux*, 46 Minn. 458, 49 N. W. 238; *Boyce v. Holmes*, 2 Ala. 54.

The demurrer to the answer was properly sustained, first, for the reason that the statute of 1903 does not purport to be retrospective; and second, for the reason that, if it did so purport, it could not be sustained in that particular, and could not authorize the defense interposed here.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5444. Decided March 27, 1905.]

37 634
42 645

HENRY W. STEIN *et al.*, as *Executors of the Last Will of*
C. A. White, Deceased, Respondents, v. ALBERT
WADDELL *et al.*, Appellants.¹

VENDOR AND PURCHASER—COVENANT TO PAY TAXES AND IMPOSITIONS—DEBTS OF VENDEE—BREACH OF CONTRACT. The agreement by vendees under a contract of sale to pay all taxes and impositions against the property is limited to charges against the interests of the vendors, and is not a covenant to pay their own debts, so as to make liens against, or an execution sale of, the vendees' interests a breach of the contract of sale.

PLEADING—APPEAL AND ERROR—REVIEW—WAIVER OF DEMURRER. Where a waiver of a demurrer is not aided by the proof, it is immaterial on appeal whether the demurrer was waived or not.

EXECUTORS AND ADMINISTRATORS—CONTRACTS—PLEADING—COMPLAINT FAILING TO ALLEGE APPOINTMENT—SUFFICIENCY—DEMURRER. In an action by executors upon a contract entered into with them as such, the complaint is sufficient, as against a general demurrer, although it fails to show by what court they were appointed executors, since they would *prima facie* have the right to enforce it.

¹Reported in 80 Pac. 184.

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Statement of Case.

APPEAL AND ERROR—BRIEFS—OBJECTIONS, WHEN TO BE RAISED—WAIVER. A point first suggested in the reply brief, and not discussed, will not be considered on appeal.

SAME. In an action to declare a forfeiture of a contract of sale for defaults in payment, a default as to interest not claimed in the complaint and first advanced in the briefs, will not be considered on appeal.

VENDOR AND PURCHASER—CONTRACT OF SALE—CONSTRUCTION—MUTUAL AND DEPENDENT COVENANTS—ACTION FOR FORFEITURE—TENDER OF CONVEYANCE. The covenants, in a contract of sale of real estate, on the part of the vendors to convey the property and take back a mortgage upon the payment of the second installment, and on the part of the vendees to make such payment, are mutual, concurrent and dependent, although the contract provides that the vendees "shall first pay," and time is made of the essence of the contract; and no action to declare a forfeiture of the contract, for nonpayment of the installment, can be maintained by the vendors without executing and tendering a deed.

SAME—INCUMBRANCES CREATED BY VENDEE—EXCUSE FOR FAILURE TO TENDER CONVEYANCE. Where the mutual covenants in a contract of sale obligate the vendor to tender a conveyance by warranty deed, before declaring a forfeiture for nonpayment of the purchase price, incumbrances created by the vendee after the sale do not constitute a breach of the warranty, nor excuse the vendor from making the tender.

SAME—FORFEITURE FOR NONPAYMENT OF PRICE—ACCEPTANCE OF PARTIAL PAYMENT—FAILURE TO TENDER DEED—EQUITY. Where \$5,000 was paid down on the purchase price of land, sold for \$20,000, and six weeks after the second installment of \$5,000 fell due, the vendors accepted partial payment of the same, and three weeks thereafter the vendors sued for a forfeiture without making a tender of the conveyance agreed upon in the contract upon payment of the second installment, equity should insist upon a strict compliance with the contract by the vendors, and the action will be dismissed.

Appeal from a judgment of the superior court for King county, Bell, J., entered April 8, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to declare a forfeiture of a contract for the sale of land. Reversed.

Will H. Thompson and Victor E. Palmer, for appellants.

Charles E. Patterson, for respondents.

RUDKIN, J.—On the 3d day of February, 1903, the plaintiffs and the defendants, Waddell and wife, entered into a contract for the sale of real estate, the material parts of which are as follows:

“That, if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned, on his part to be made and performed, the said parties of the first part hereby covenant and agree to convey, by a good and sufficient warrantee deed, guaranteeing property free from all mortgages, taxes, judgments, liens or any other incumbrance, the following lots, pieces or parcels of land, situated in the county of King, state of Washington, and more particularly described as follows, to wit: [Here follows description.]

“And the said party of the second part hereby covenants to purchase said land, and agrees to pay to said parties of the first part the sum of twenty (\$20,000.00) thousand dollars, in the manner following: Five thousand (\$5,000) dollars upon the delivery of these instruments properly signed, sealed and acknowledged; five thousand (\$5,000) dollars more on or before August 3rd, 1903; ten thousand (\$10,000) dollars more on or before February 3rd, 1904; making a total of twenty thousand (\$20,000) dollars, the full amount of the purchase price.

“The parties of the first part hereby agree with the party of the second part that they will, upon the payment of \$10,000.00, give a warranty deed and take a note and first mortgage for the balance due: namely, \$10,000.00, said note and mortgage to be due and payable on or before February 3rd, 1904. Parties of the first part hereby agree that second party shall have the right to plat said tract of land into an addition, and upon the payment of the sum of \$225.00 per lot they hereby agree to release any lot in said tract when platted, from the lien they now

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hold against said tract. All payments which are to fall due after the execution of this instrument, to draw interest at the rate of seven (7) per cent per annum, payable semi-annually on each of said installments until the full payment thereof: second party to pay all taxes, assessments and impositions that may be legally levied or imposed upon said lot; and in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the said parties of the first part; and the said party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by him sustained; and they shall have the right to re-enter and take possession of said land and premises and every part thereof.

"It is mutually agreed that time is and shall be the essence of this contract and that all covenants and agreements herein mentioned shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties."

The defendants, Waddell and wife, paid on account of this contract the sum of \$5,000 at the time of its execution, and thereafter paid the sum of \$900 in installments of \$225, at various times, the last installment being paid on the 18th day of September, 1903. On the 10th day of October, 1903, this action was commenced for the purpose of declaring a forfeiture of said contract. Among the grounds of forfeiture were, the nonpayment of the balance of the \$5,000 due August 3, 1903, with interest; the nonpayment of taxes; an execution sale of the interest of the Waddells in the property, on a judgment in favor of a third party; the filing of numerous liens against the property by third parties who had performed labor and made improvements at the instance of the Wad-

dells; agreements on the part of the Waddells to sell portions of the land, etc.

It was not claimed that any taxes had been allowed to accumulate against the property, after the sale and before the commencement of the action, and it cannot be seriously claimed that the other matters, above referred to, constituted any breach of the contract of sale. The Waddells agreed to pay all taxes, assessments, and impositions that might be levied or imposed upon the property, but this covenant is clearly limited to impositions which would be a charge against the vendors' interest in the property, and was not a covenant that the purchasers would pay their own debts or discharge obligations for which they and their interest in the property were alone liable.

The complaint alleged that the interest and claim of the plaintiffs were paramount to all the claims above set forth, and the court so found. This is unquestionably true, so that the only breach of the contract of sale shown by the complaint was the failure of the Waddells to pay the balance of the \$5,000 installment due on August 3, 1903, with interest. The plaintiffs had judgment below according to the prayer of their complaint, and the defendants, Waddell and wife, appeal.

There is some question in the record as to the waiver of a demurrer interposed by the appellants, but, inasmuch as the defect in the complaint, if any, was not aided by the proof, it is immaterial whether the demurrer was waived or not. The main contention urged by the appellants is that the complaint does not state facts sufficient to constitute a cause of action, for two reasons: first, because it does not show by what court, if any, the respondents were appointed executors; and, second, because it does not allege that the respondents performed, or offered to perform, their part of the contract. We think the complaint

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is sufficient on the first point as against a general demurrer. *Waldo v. Milroy*, 19 Wash. 156, 52 Pac. 1012. The appellants contracted with the respondents as executors and this, prima facie at least, would give the executors a right to enforce or forfeit the contract, by suit or otherwise. It is also suggested in the reply brief that the trust, created by the will of which the respondents are executors, is void, but this question was not discussed, and will not be considered on this appeal.

The argument in support of the second point is, that the covenant on the part of the respondents to convey the property and take a mortgage back, upon the payment of the second installment due under the contract, and the covenant on the part of the appellants to make such payment, are mutual, concurrent and dependent, and that the respondents must perform the contract on their part, or, in other words, must execute and tender a deed before they can maintain an action upon the contract, or to declare a forfeiture thereof. In suits in equity for specific performance, and in actions at law to recover the purchase price, this rule is firmly established by the authorities. *Bank of Columbia v. Hagner*, 1 Peters 455, 7 L. Ed. 219; *Ackley v. Elwell's Adm'rs*, 10 N. J. L. 361; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; *Frink v. Thomas*, 20 Ore. 265, 25 Pac. 717, 12 L. R. A. 239; *Egbert v. Chew*, 14 N. J. L. 447; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910. The respondents contend that this rule should not obtain in this case for several reasons which we will now consider.

It is first claimed that the covenants in this agreement are independent. A court will not readily presume that a vendor intends to part with his title without receiving the purchase price, or that the purchaser intends to part with his purchase money without receiving a deed. In

other words, a covenant to convey and a covenant to pay the purchase price will be held to be concurrent and dependent, unless the contrary clearly appears to have been the intention of the parties, and the use of the words, "shall first pay," as in this case, has no particular significance. Under the authorities above cited, we think that the covenants in this case are clearly concurrent and dependent.

It is further claimed that there was, also, a default in the payment of the semi-annual interest due on the last payment, amounting to the sum of \$350. In answer to this contention we need only say that this claim was advanced for the first time in the respondents' brief. No such claim was made in the complaint.

It is further claimed that the respondents could not give a warranty deed by reason of the encumbrances against the property, as set forth in the complaint. We do not agree with counsel that encumbrances created or suffered by a purchaser, under a contract of sale, constitute a breach of the warranty contained in the vendor's deed which is given in pursuance of the contract of sale. Furthermore, if the demand for the payment of the purchase money due was insufficient, the demand to discharge the encumbrances would fail for the same reason.

The main contention is that the rule above announced does not apply in an action brought for the purpose of declaring a forfeiture of a contract. We cannot agree with this contention. If a vendor in default cannot maintain an action on the contract, *a fortiori* he should not be permitted to maintain an action to declare a forfeiture. *Frink v. Thomas, supra*, was an action brought to cancel or forfeit a contract. In answer to the claim here made, the court says:

"As a general rule, a party who asks for the rescission of a contract for the sale of real estate must be himself without fault; and when, as in this case, the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract, without performance or a valid offer to perform on his part, and, so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance, until he has tendered performance on his own side and demanded it on the other."

The respondents in this case did not insist on a strict performance by the appellants. They accepted a partial payment on the contract some six weeks after the cause of forfeiture accrued, and within three weeks thereafter this action was brought. Under such circumstances, a court of equity should insist upon a strict compliance with the terms of the contract, on the part of one invoking its aid to declare a forfeiture. The complaint was insufficient, and the proofs did not aid it.

The judgment is therefore reversed, with directions to dismiss the action.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ., concur.

Root and Crow, JJ., took no part.

[No. 4917. Decided March 27, 1905.]

WASHINGTON LOAN & TRUST COMPANY, *Appellant*, v.
CATHERINE J. RITZ *et al.*, *Respondents*.¹

ESTOPPEL—IN FAVOR OF PURCHASER OF MORTGAGED PREMISES—BILLS AND NOTES—MORTGAGES—HOLDER OF UNPAID COUPONS—NOTICE OF NEGOTIATIONS. Where a purchaser of mortgaged property, who had assumed payment of the mortgage as part of the purchase price, paid the amount claimed by the holder, and received a satisfaction in full discharge of the mortgage, the holder of unpaid negotiable coupon notes secured by the mortgage, to whom they had been assigned by the holder of the mortgage before maturity, is not estopped to assert a claim against the property and to foreclose the mortgage to satisfy the same, by reason of the fact that four days before he purchased the property or assumed the mortgage, the purchaser wrote to the assignee of the coupons that he was about to arrange a release of the mortgage and if it had any interest to advise him, and that he received no reply; nor by the fact that the assignee had for a long time been the agent of the holder of the mortgage for the purpose of collecting interest, had notice of the pending negotiations, and gave no notice that it held the coupons or that they were unpaid.

BILLS AND NOTES—MORTGAGES—ASSIGNMENT OF COUPONS—PAYMENT—ESTOPPEL. Where a loan and trust company, having sold a mortgage and coupon notes to an eastern customer, was in the habit of advancing payment of the coupons six days before maturity, and the holder returned the coupons endorsed with the stamp of negotiability, the transaction does not amount to a voluntary payment of the coupons, and the trust company is not estopped to collect the same from the makers or from one who had assumed the mortgage.

Appeal from a judgment of the superior court for Adams county, Neal, J., entered July 21, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Reversed.

¹Reported in 80 Pac. 174.

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Citations of Counsel.

J. N. Pickrell, for appellant, contended, among other things, that the assumption of the mortgage obligated the purchaser to pay the whole of the mortgage debt. *Ricard v. Sanderson*, 41 N. Y. 179; *Hardin v. Hyde*, 40 Barb. (N. Y.) 435; *Foster v. Wightman*, 123 Mass. 100; *Windle v. Hughes*, 40 Ore. 1, 65 Pac. 1058; *Sands v. Church*, 6 N. Y. 347; *Hartley v. Harrison*, 24 N. Y. 170; *Green v. Houston*, 22 Kan. 35; Devlin, Deeds, § 1063; Jones, Mortgages (4th ed.), § 744; 15 Am. & Eng. Ency. Law (1st ed.), pp. 836, 837; *Merriam v. Miles*, 54 Neb. 566, 74 N. W. 861; 69 Am. St. 731; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892; *Solicitors' Loan etc. Co v. Robins*, 14 Wash. 507, 45 Pac. 39. The partial payment, without surrender of the coupons, does not relieve the purchaser from his agreement to pay the coupons. *Brayley v. Ellis*, 71 Iowa 155, 32 N. W. 254; *Vandercook v. Baker*, 48 Iowa 199; *Black v. Reno*, 59 Fed. 917; *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29. The payment was at his peril. *Mayo v. Moore*, 28 Ill. 428; *Mulcahy v. Fenwick*, 161 Mass. 164, 36 N. E. 689; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520. The plaintiff's taking up of the coupons was not a voluntary payment of the same. 22 Am. & Eng. Ency. Law (2d ed.), 536; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Ketchum v. Duncan*, 96 U. S. 659; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *Morris Canal Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423; *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 1 Am. St. 319. The coupons were negotiable. *Everston v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Johnson v. Stark Co.*, 24 Ill. 75; *Murray v. Lardner*, 2 Wall. 110; *Richie v. Cralle*, 108 Ky. 483, 56 S. W. 963. The transfer was an assignment

pro tanto of the mortgage. *New England Loan etc. Co. v. Robinson*, 56 Neb. 50, 76 N. W. 415; *Mutual Benefit L. Ins. Co. v. Huntington*, 57 Kan. 744, 48 Pac. 19; *Brewer v. Atkeison*, 121 Ala. 410, 77 Am. St. 64; *State Bank v. Mathews*, 45 Neb. 659, 63 N. W. 930, 50 Am. St. 565; *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. 714; *Miller v. Rutland etc. R. Co.*, 40 Vt. 399, 94 Am. Dec. 413; *In re Sewall v. Brainerd*, 38 Vt. 364; *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. 601; Howell's Statutes, subd. 4, § 8498; *Haven v. Grand Junction etc. R. Co.*, 109 Mass. 96; *Keohane v. Smith*, 97 Ill. 156. After the assignment, the mortgagee could not discharge the debt. Jones, Mortgages (4th ed.), §§ 814, 818; *Eggert v. Beyer*, 43 Neb. 711, 62 N. W. 57; *Windle v. Bonebrake*, 23 Fed. 165.

Holcomb & Zent and *O. R. Holcomb*, for respondents. The coupons were voluntarily paid. *McAuliffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *Johnson v. Carpenter*, 7 Minn. 176; *Olson v. Northwestern etc. Loan Co.*, 65 Minn. 475, 68 N. W. 100. There is no subrogation in favor of a mere volunteer. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *National Bank v. Cushing*, 53 Vt. 326; *Kleimann v. Geisselmann* (Mo.), 21 S. W. 796; *Norris v. Woods*, 89 Va. 873, 17 S. E. 552; *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625; *Martin v. Martin*, 164 Ill. 640, 45 N. E. 1007, 56 Am. St. 219; *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Seieroe v. Homan*, 50 Neb. 601, 70 N. W. 244; *Commonwealth v. Chesapeake etc. Canal Co.*, 32 Md. 501; *Swan v. Patterson*, 7 Md. 164; *Muir v. Berkshire*, 52 Ind. 149; *Coe v. New Jersey etc. R. Co.*, 31 N. J. Eq. 105; *Levy v. Martin*, 48 Wis. 198; *Bayard v. McGraw*, 1 Ill. App. 134; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep.

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794. The plaintiff was by its conduct estopped from asserting any claim on the coupons against the purchaser of the property. *Pierce v. Andrews*, 6 Cush. 4, 52 Am. Dec. 748; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Caldwell v. Auger*, 4 Minn. 217, 77 Am. Dec. 515; *Drew v. Kimball*, 43 N. H. 282, 80 Am. Dec. 163; *New York Car Spring Co. v. Union Rubber Co.*, 4 Blatch. (Ind.) 11; *Groton v. Hurlburt*, 22 Conn. 178; *Phillips v. Clark*, 4 Met. 348, 83 Am. Dec. 471; *Titus v. Morse*, 40 Me. 348, 63 Am. Dec. 665; *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654; *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129; *Markham v. O'Connor*, 52 Ga. 183, 21 Am. Rep. 249; *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424; *Roeder v. Fouts*, 5 Wash. 135, 31 Pac. 432, 11 Am. & Eng. Ency. Law (2d ed.), pp. 427-434; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771, 24 Am. St. 210, 13 L. R. A. 270; *Brookhaven v. Smith*, 118 N. Y. 634; *Kelly v. Fairmount Land Co.*, 97 Va. 227, 33 S. E. 598.

PER CURIAM.—On the 1st day of October, 1888, Philip Ritz and Catherine J. Ritz, his wife, executed and delivered to Thomas S. Krutz their certain promissory note, for the sum of \$1,400, due four years after date. On the same day, for the purpose of securing the payment of said promissory note, according to its terms, the makers thereof mortgaged to the said Krutz certain real property, in Adams county, in this state. At the time of negotiating said loan, the said Krutz was the general business manager of the plaintiff corporation, and the loan in question was negotiated by him in that capacity. Thereafter this note and mortgage were transferred, without recourse, to the Portsmouth Fire Association of New Hampshire. George A. Fernald & Co., bankers and brokers of Boston, negotiated the sale of the note and mortgage to the Ports-

mouth Fire Association, and all interest on the loan was thereafter paid through said Fernald & Co., as agents of the assignee of the mortgage.

Prior to the maturity of the note, Philip Ritz, one of the makers, died testate, in said Adams county, and the note was not paid when due. On the 15th day of September, 1892, the assignor of the mortgage and Catherine J. Ritz, Hattie M. Ritz, and Ella Coss, the successors in interest of the original mortgagors in the mortgaged premises, entered into an agreement extending the time for the payment of this loan for a period of five years from the 1st day of October, 1892. This extension agreement was first executed between said second parties and the said Krutz, but thereafter the assignee of the mortgage approved such extension and the said Krutz on the 8th day of October, 1892, assigned the extension agreement to the assignee of the mortgage.

At the time of executing said extension agreement, the said Catherine J. Ritz, Hattie M. Ritz, and Ella Coss also executed and delivered to the said Krutz ten certain interest coupons, in the sum of \$49 each, payable to the said Krutz or bearer, in payment of the semi-annual interest to accrue on said loan on the 1st day of April, and on the 1st day of October, of each year during such extension period. These interest coupons were delivered to the assignee of the mortgage at the time of the assignment of the extension agreement. The first six of these interest coupons to mature were taken up or paid in the following manner; six days prior to the maturity of each coupon, the plaintiff in this action would remit the full amount of the coupon to said Fernald & Co., agents of the assignee of the mortgage, and the said Fernald & Co. would return the coupon to the plaintiff with the following endorsement thereon: "Pay to the order of the Washington Loan &

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Trust Co. (Signed) Geo. A. Fernald & Co." There seems to have been no agreement, between the assignee of the mortgage and coupons and the plaintiff, or between the plaintiff and the makers of the coupons, that the coupons should be taken up or paid in this manner.

The first two coupons to mature were paid to the plaintiff by the makers thereof, after they had been returned by Fernald & Co. in the manner above stated. The four coupons next to mature have never been paid, except that the money was advanced by the plaintiff and the coupons returned to it, endorsed as above set forth. On the 9th day of March, 1898, the defendant Hauschild purchased a portion of the mortgaged premises from the mortgagors or their successors in interest, and, as a part of the consideration, assumed and promised to pay this mortgage debt. On or prior to the 8th day of April, 1898, the defendant Hauschild paid to the Portsmouth Fire Association, assignee of the mortgage, the full amount of the mortgage debt, with all interest, exclusive of the two coupons paid by the mortgagors, and the four coupons taken up by the plaintiff in this action in the manner hereinbefore stated, and the said Portsmouth Fire Association, as assignee of the mortgage, executed and delivered to said Hauschild a full release and satisfaction of said mortgage. The assignment of the mortgage from Thomas S. Krutz to the Portsmouth Fire Association was dated March 28, 1898, and the assignment and release were recorded in said Adams county on the 18th day of April, 1898. This action was commenced on the 9th day of May, 1898, to recover the amount of the four coupons above mentioned, and to foreclose the mortgage given to secure the same. The defendants had judgment below.

The court found, among other things, that the last of the four coupons in question to mature was paid to the

Portsmouth Fire Association by the respondent Hauschild; that the appellant was estopped by its conduct to assert any right to recover on these coupons, as against the respondents Hauschild and wife, and

"That the plaintiff [appellant], about six days prior to the dates of maturity thereof, in each case, voluntarily, and without having previously purchased them, paid to the Portsmouth Fire Association, the following coupons, to wit: \$49.00 due April 1, 1894; \$49.00 due October 1, 1894; and \$49.00 due April 1, 1895; to Portsmouth Fire Association, the legal owner and holder thereof and the said coupons, together with one due October 1, 1895, for \$49.00, are the coupons sued on in this action."

The finding that the coupon due October 1, 1895, was paid to the Portsmouth Fire Association by the respondent Hauschild, finds no support in the record.

In support of the plea of estoppel, it is claimed that the respondent Hauschild, on the 5th day of March, 1898, or four days before he bought the mortgaged property and assumed the mortgage debt, wrote the managing agent of appellant, at Seattle, that he was about to arrange for a release of the Ritz mortgage, and that, if he had any claim or interest in the matter, to kindly advise him at once, and that he received no reply. It is further claimed that the appellant had notice of the negotiations pending between the respondent Hauschild and the Portsmouth Fire Association with a view of obtaining a release of this mortgage, and remained silent, and, further, that the appellant was, for a long time, the agent of the Portsmouth Fire Association in the collection of interest on this loan and never made known to it the fact that it held these coupons, or that they had not been paid. These facts, if true, are wholly insufficient to support the plea of estoppel, and the judgment below must be sustained, if at all, upon the find-

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ing or conclusion that the transaction hereinbefore mentioned constituted a voluntary payment of these coupons on the part of the appellant, and that the appellant is not an assignee or transferee thereof.

We do not think that the transaction in question can be construed as a voluntary payment of these coupons. To have that effect, it must appear that such was the intention of the parties at the time the money was advanced and accepted. *Ketchum v. Duncan*, 96 U. S. 659. The coupons in this case were not cancelled, but, on the contrary, were delivered to the party making the payment with the stamp of negotiability endorsed on the back. It is clear, from the uncontradicted testimony, that the appellant did not intend that the transaction should operate as a payment or satisfaction of the coupons, and the only evidence before us as to the intent of the mortgagee or holder of the coupons is the endorsement on the back thereof, directing payment to be made to the appellant in this case. We think, therefore, that the finding of the trial court that the appellant voluntarily paid these coupons, and is estopped to assert any rights under them, as against the respondent, is not warranted by the evidence. There is no pretense that these four coupons were ever paid, either by the makers or by the respondent Hauschild, who assumed them.

The judgment is reversed, with directions to enter a decree cancelling the satisfaction of the mortgage in question, and foreclosing the same for the amount due on the four coupons in suit, together with an attorney fee of \$100.

[No. 4933. Decided March 27, 1905.]

*In re Application of LOUIS GARFINKLE for a Writ of
Habeas Corpus.*

LOUIS GARFINKLE, *Respondent*, v. JOHN SULLIVAN, as
*Chief of Police of Seattle, Appellant.*¹

APPEAL—APPEALABLE ORDERS—DISCHARGE IN HABEAS CORPUS. Habeas corpus being a civil proceeding, an appeal lies from an order discharging the prisoner.

MUNICIPAL CORPORATIONS—PEDDLERS—LICENSE—ORDINANCES—CONSTRUCTION—EXEMPTION OF MERCHANTS. A provision in a section of an ordinance regulating peddlers from wagons, etc., that "this section" shall not apply to storekeepers or merchants, must be construed to relate exclusively to said section and not to a subsequent section relating to the maintenance of booths, stands, etc., within a restricted district.

SAME. A clause in an ordinance excepting merchants from taking out a peddler's license, with the proviso that they shall not act as peddlers without first obtaining a license, is wholly ineffective as an exemption, leaving merchants in the same position as they would have been in without such clause.

APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIONS. In actions triable *de novo* on appeal, the findings of the trial court are not conclusive like the verdict of a jury, and while more or less advisory and controlling when based on evidence nearly equal, the supreme court will look at the testimony to see if the findings are justified.

MUNICIPAL CORPORATIONS—PEDDLERS—LICENSE OF—TAXATION—EXCESSIVE LICENSE AS POLICE REGULATION—TAX FOR REVENUE—FINDINGS NOT SUPPORTING CONCLUSIONS. A finding that the amount of a peddler's license is not required by the city for purposes of police regulation does not sustain the conclusion that it is excessive and the ordinance void, since the city has a right, in addition, to impose a tax on peddlers for the purposes of revenue.

SAME—EVIDENCE OF PROHIBITIVE LICENSE FEE—SUFFICIENCY—ELEMENT OF COMPETITION. Evidence that a license tax of \$100 for peddlers with two-horse wagons in the city of Seattle, where

¹Reported in 80 Pac. 188.

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there were eighty people engaged in the business, was burdensome and prohibitive of the transaction of the business does not sustain a finding that the same is excessive, since the question must be determined irrespective of the element of competition, individual ability, and other facts, not related to the business under the most favorable conditions.

SAME—UNIFORMITY OF TAXATION. The rule requiring uniformity in taxation does not apply to a license upon trades or occupations, since the same is not a tax on property.

Appeal from a judgment of the superior court for King county, Bell, J., entered July 14, 1903, discharging a prisoner upon a writ of habeas corpus, after a hearing on the merits. Reversed.

Ellis De Bruler, for appellant.

Tucker & Hyland, for respondent.

DUNBAR, J.—The petitioner and respondent was convicted before a justice of the peace, in Seattle, for peddling with a two-horse wagon without a license, which was required by virtue of ordinance 6,036, as amended by ordinance 8,327, was fined in the sum of \$5, and committed to the city jail until such fine should be paid. He sued out a writ of habeas corpus before Judge Bell, in the superior court of King county, and was discharged from custody thereon. The city appeals from such judgment of discharge.

Respondent moves to dismiss this appeal for the reason that the order appealed from is not an appealable order, but, under the decisions of this court to the effect that a habeas corpus proceeding is a civil proceeding, the motion will be denied.

Respondent was prosecuted for violating an amendment to the ordinance referred to above, the pertinent parts of which are as follows:

"For peddling meat, game, poultry, fruit, vegetables, butter, eggs, or other edibles, farm or dairy produce not included in the exceptions of this section, with a wagon drawn by two horses, one hundred dollars, per annum; with a wagon drawn by one horse, seventy-five dollars per annum; when the article, thing or product mentioned in this paragraph is sold or delivered by a person or persons carrying or transporting the same by any other means or in any other manner, fifty dollars for each such annual license period, and no license to be issued for a less period than one year."

The respondent also complained of § 15 of said ordinance 6,036, the same reading as follows:

"It shall be unlawful for any person to set up or maintain any booth, stand, table, box, board, shelf, or other object for the sale of fruits, sweetmeats, beverages or other commodity therefrom, or to expose for sale any fruit, sweetmeats, beverages or other commodity, or for any other purpose, on any street, alley or public ground in the city limits, to wit: all that part of the city of Seattle lying south of Denny way and west of Eighth avenue and Eighth avenue south, and including said way and avenues;"

and further providing that it should be unlawful for any person to hawk or sell at retail, or peddle from any basket, box, tray, wagon, etc., fruits or other commodities with the exception of milk, ice, bread or newspapers, within the same territory; for the reason that subd. 8 of § 14 makes an unlawful discrimination as against peddlers and in favor of local dealers, which subdivision reads as follows:

"That this section shall not be applicable to storekeepers or merchants who have permanent business locations engaged in the sale of the things, articles or products aforesaid; provided, however, that no merchant or storekeeper shall act as a peddler, huckster, or hawker without first obtaining a license as aforesaid."

The court found that that part of ordinance 6,036 was

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void, for the reason that it discriminated in favor of the merchants in allowing them to hawk or peddle commodities in the district which was restricted, and in which other peddlers were prohibited from operating in like manner. But an examination of this ordinance convinces us that the court was entirely in error in its construction, and that subdivision 8 complained of, viz., the provision that the section should not be applicable to storekeepers or merchants, was intended to apply exclusively to the provisions of § 14, instead of to § 15 with reference to the restricted district, and that there was no intention, in enacting the ordinance, to allow any one to peddle or hawk within the restricted district, and therefore no discrimination in favor of the local merchants. The provision, it is true, seems to be rather senseless under any construction which can be placed upon it, for it provides that § 14 shall not be applicable to storekeepers or merchants, and then makes the further provision that no merchant or storekeeper shall act as a peddler or huckster or hawker without first obtaining a license as aforesaid, thereby placing the merchant in exactly the same position as it does others, a position that he would have been in without the enactment of subd. 8 at all. But it cannot, under any circumstances, be construed to have reference to § 15, because the language of the subdivision is that "this section [which is § 14] shall not be applicable," etc.

So that the question recurs squarely upon the proposition of whether the license imposed under § 15 was so great as to be prohibitive, and, if so, whether or not the further power of the city to tax the business was exceeded. For it was held by this court, in *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205, that cities of the first class, under their charters, have power to grant licenses for the purpose of revenue, as well as for the purpose of

police regulation, and this doctrine was reaffirmed in *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892.

It is insisted by the respondent that the question in this case is not whether or not the license could be pronounced too high or oppressive, but that it is a question of sustaining the findings of the lower court. While there have been some expressions in some of the cases which might be construed as holding that this court would be bound by the findings of the lower court, and while it was so inadvertently decided in *Second Nat. Bank v. Hatch*, 24 Wash. 421, 64 Pac. 727, with that exception, the uniform holding of this court has been to the contrary, as it must be under the provisions of the statute, and that case is now expressly overruled, and the announcement made that the same rule does not obtain in passing upon the findings of the court as does upon the verdict of a jury. In the latter case the court is bound by the verdict of a jury on questions of fact, while in the former, though the findings of the court are more or less advisory to this court, and the evidence upon which they are based (being found nearly equal) might be controlling, yet such findings are not conclusive on the appellate court, which will look at the testimony to see if the findings are justified.

In this particular case, the court, in its findings, seemed to overlook the cases of *Stull v. De Mattos* and *Fleetwood v. Read*, *supra*, and the finding was that the amount of the license for peddling provided by said ordinance—for a two-horse wagon \$100, and for a one-horse wagon \$75—was so excessive as to amount to a tax, and that said amounts were not required by the city of Seattle for the purpose of regulating such peddlers. We think the testimony in the case fully justifies the finding of the court that the amount of the license was not required by the city of Seattle for the purpose of regulating the peddlers; but,

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inasmuch as in addition to that the city had the right to impose a tax, the finding is not sufficient to warrant the judgment which followed.

Testimony was also introduced to the effect that the license or tax was prohibitive of the business sought to be controlled. Of course, it is an unquestioned principle of law that a municipality cannot, under the guise of license or regulation, place the license so high that it is prohibitive of the transaction of the business sought to be engaged in; but, while it was conclusively shown by the testimony in this case that the license was burdensome, under the conditions existing, and that peddlers could not afford to engage in the business of peddling and pay the tax required, it was also shown that there were some eighty persons engaged in this business; and, as was said in *Stull v. De Mattos, supra*:

"So many conditions enter into every business enterprise, tending to make it successful or unsuccessful, that it cannot be said that its non-success is caused by any one condition. It may be the fault of the individual having the business in charge. Common experience needs only to be cited to prove that under exactly similar conditions many succeed where one fails."

In this particular case, not only the business qualifications of the parties who swore to the fact that they could not make a living, if they paid this license, are to be taken into consideration, but the other fact as to the amount of competition in the business. It might be that, if there were no license imposed, the competition would be so great that one could not engage in the business with profit. A license cannot be said to be prohibitive in amount where it is shown that one hundred men could not pay the license and do the business profitably. The same might be said of fifty or twenty-five, or any number of men greater than one. But the doctrine must be restricted to an individual,

or to the business under the most favorable circumstances, divested of the element of competition, inability, inexperience, and other qualities which might lead to the failure of any business, with or without the payment of a license. The most common cases in which this question of prohibitive license arises are cases where licenses are imposed for the sale of spirituous liquors, and, while it has been held in many cases that the license imposed was prohibitive, it has always been so held only where the prohibition related to the business itself under the most favorable conditions. In such case, the question of competition is never discussed, nor would an applicant be heard to say that he could not afford to pay \$1,000 for a license for conducting a saloon because there were other men engaged in the same business in the same city. Nor can the petitioner avoid the tax on the ground of want of uniformity in taxation, for we held in *Fleetwood v. Read, supra*, that a tax on trades, professions, and occupations was not a tax on property which fell within the inhibition imposed by the constitutional provisions in relation to uniformity of taxation.

Believing that the court erred in discharging the prisoner, the judgment is reversed.

MOUNT, C. J., HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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Citations of Counsel.

[No. 5357. Decided March 28, 1905.]

ANDREW J. LYNCH, *Appellant*, v. THE CITY OF NORTH
YAKIMA, *Respondent*.¹

MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—INJURY TO TEAMSTER—NEGLIGENCE OF OFFICERS—GOVERNMENTAL FUNCTIONS. A city is not liable to a teamster in its fire department for injuries sustained while training horses, by reason of the negligence of the chief of the department in representing that a vicious horse was gentle, and in failing to supply a necessary appliance for the work, since there is no liability for the improper discharge of governmental functions by city officers.

MUNICIPAL CORPORATIONS—GOVERNMENT FUNCTIONS—CONTAGIOUS DISEASES—NEGLIGENCE OF OFFICERS. The care of persons afflicted with contagious diseases is a governmental function, so that the city is not ordinarily liable in damages for the negligence of its officers in performing the service.

SAME—VICIOUS HORSES—NOTICE—CONTRIBUTORY NEGLIGENCE. A teamster in a fire department who for seven weeks had been handling a team of horses, is bound to know whether they are vicious, and if so, he is guilty of contributory negligence in placing himself where he might be kicked.

SAME—ACTION FOR NEGLIGENTLY EXPOSING CITY EMPLOYEE TO SMALLPOX—CONTRIBUTORY NEGLIGENCE. In an action against a city for damages for negligently exposing an employee in the fire department to smallpox, the plaintiff is guilty of contributory negligence precluding a recovery, where it appears that he remained in the room and proceeded to fumigate the afflicted person when he might have departed, that being no part of his duty.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered June 22, 1903, dismissing an action for damages for injuries sustained by a member of a fire department, after sustaining a demurrer to the complaint. Affirmed.

Thompson & Allen and *H. J. Snively*, for appellant, cited: *Farley v. New York*, 152 N. Y. 222, 46 N. E. 506,

¹Reported in 80 Pac. 79.

57 Am. St. 511; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Rhobidas v. Concord*, 70 N. H. 90, 47 Atl. 82, 85 Am. St. 604, 51 L. R. A. 381; *Potter v. New Whatcom*, 20 Wash. 589, 56 Pac. 394, 72 Am. St. 135.

Snyder & Preble, for respondent.

Root, J.—Appellant sued respondent, a city of the third class, for damages, and in his complaint sets forth two alleged causes of action. In the first he avers that respondent employed one Hauser as chief of its fire department, who had authority to, and did, employ appellant as driver of a team of horses, which respondent furnished to draw the fire engine; that it was part of appellant's duty to drill said horses "to work to the bell"—that is, to rush from their stalls expeditiously when a fire alarm was sounded; that an "electric whip" is an inexpensive appliance commonly used for thus drilling horses, which, if used, would have made it unnecessary for appellant to be in the position where he was when hurt, as herein stated; that, in the absence of such electric whip, it was necessary for appellant to stand behind said horses and strike them with a stick, when the alarm was sounded; that, at the time of his injury, he was standing behind one of said horses preparatory to striking him when the alarm should sound, and while there he was kicked by one of said horses and very severely injured; that said Hauser had told appellant that said horses were a "good, gentle work team," and appellant relied upon said statement, never himself having observed any viciousness on the part of said animals; that he had been in charge of said team about seven weeks; that said injury was caused by the carelessness and negligence of the defendant in not supplying said electric whip, and in providing a vicious and kicking horse, and in carelessly

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and negligently, through said Hauser, holding out to appellant that said horses were gentle work horses.

In his second alleged cause of action, he sets forth his employment as mentioned in the first cause of action, and alleges that he was required to be and remain at a certain building in a certain room where the fire apparatus and horses were kept, so as to be in readiness in case of a fire alarm; and that on the occasion in question, while in said room, one of the respondent's policemen brought in a man "charged with having been exposed to smallpox," and whom the said officer should have known, by the use of ordinary care, to have been so exposed; that, while in said room, said man was fumigated by this appellant, and thereupon left the room; that, by reason of said exposure, this appellant contracted the smallpox, and, before he was aware of that fact, four of his children contracted the disease from him; that appellant was thus exposed and sickened by reason of the negligence and carelessness and lack of ordinary care, on the part of respondent, in not providing, by ordinance, or otherwise, a place for persons who had been in contact with the smallpox, to be taken away and apart from other persons, and in not directing its officers and policemen to keep such exposed persons thus apart from others.

Upon the first cause of action, he claims damages in the sum of \$10,225.65, and upon the second cause of action, damages in the sum of \$1,000. To his complaint respondent interposed a demurrer, which was sustained as to both causes of action. Appellant elected to stand upon said complaint; whereupon the action was dismissed. From the judgment of dismissal, he appeals to this court.

We will first address ourselves to a consideration of the first cause of action alleged. It is contended by respondent that a municipal corporation is not liable for damages

occasioned by or to firemen, while engaged in the line of their duty. In the case of *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347, this court said:

" . . . it is a well known fact that the apparatus used by a fire company is not under the control of the city, but is under the special control and inspection of the fire company, and such city can, therefore, no more be held for the defective condition of the apparatus than it can for its negligent operation by the company."

In the case of *Hafford v. New Bedford*, 16 Gray 297, the supreme court of Massachusetts said:

"The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service; and no action will lie against the city for their negligence or improper conduct, while acting in the discharge of their official duty."

In the case of *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368, the supreme court of Ohio, speaking of the authority of municipal corporations to establish fire companies, and procure engines and fire extinguishing apparatus, said:

"But the powers thus conferred are in their nature legislative and governmental; . . . and for any defect in the execution of such powers, the corporation cannot be held liable to individuals. Nor is it liable for neglect of duty on the part of fire companies, or their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of duties."

In the case of *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760, the supreme court of Wisconsin, discussing this subject matter, said:

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"The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community. . . . They [the members of the fire department] act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of the official duty no action will lie against the city, unless expressly given; and hence the maxim *respondeat superior* has no application."

In the case of *Jewett v. New Haven*, 38 Conn. 368, 386, 9 Am. Rep. 382, the supreme court of Connecticut said:

"We think, in a case like the present one, where the question is whether the principle of *respondeat superior* applies to a municipal corporation, it should distinctly appear, in order to hold them liable, that the service in which the party doing the mischief was engaged at the time was private and not public; that it was not rendered for others as acts of benevolence, while the party was laboring for their benefit, in their employment. Municipal corporations are different from those of a monied character."

It is difficult to announce a rule as to just where liability of a municipality commences or where it ceases. But it may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function. The duties of an officer or employee of a fire department are regarded as for the benefit of the community, and not for the mere advantage of the municipality as a corporate body. The city, possessing, as it does, a portion of the sovereignty of the state, in the exercise thereof provides and maintains a fire department. The services of this department are for the benefit of all persons who may have property in the city limits capable of in-

jury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department, the city was exercising governmental functions. This seems to have been the view entertained by the courts that have considered this subject. In the case at bar the respondent had provided, and was maintaining, a fire department. The horses, engines, and apparatus were under the charge of a fire chief. In view of these facts, and in view of the character of the employment in which appellant was engaged, it impresses us as a case where the circumstances of his injury occasion no liability upon the part of the city.

As to the second cause of action, much is applicable which has been hereinbefore said as to the first. The handling of persons sick with contagious diseases is a duty which the city performs, through its officers and agents, in the exercise of governmental functions. The benefits of such service go to the public, and not to the municipality as a corporate body. Hence, the manner in which the officers of the city perform said service cannot, ordinarily, render the municipality liable in damages. In the case of *Nicholson v. Detroit*, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601, the supreme court of Michigan held that, where its officers engaged a man to tear down a building which had been used as a smallpox hospital, and without having adopted any measures in the way of disinfection, by reason of which the person engaged contracted the disease and died, the city was not liable for this negligence on the part of its officers. Among other things the court said:

"The true theory is that the township or city represents the state, in causing these things to be done, and like the state, it enjoys immunity from responsibility in case of injury to individuals, leaving liability for such injuries to rest upon the persons whose misconduct or negligence is the immediate cause of the damage."

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In the case of *Ogg v. Lansing*, 35 Iowa 495, 14 Am. Rep. 499, the supreme court of that state held that a city was not liable for the negligence of its officers or agents in executing sanitary regulations, or in taking the care and custody of persons afflicted with contagious diseases.

In addition to the reasons assigned hereinbefore, we are inclined to think that the complaint does not state facts sufficient to constitute a cause of action, even if the city could be held as an ordinary employer, and leaving out of consideration the question of governmental functions. It appears from the complaint that appellant had been handling these horses for several weeks before the accident occurred. He knew of the absence of the electric whip. It must be presumed that when he accepted the position of teamster he had at least an ordinary knowledge of the nature of horses. This, with his seven weeks' experience in handling this particular team of horses, should have given him a familiarity with the character of these animals. He was in as good a position as any one well could be to know of the dangers reasonably to be expected from them. If with that opportunity, knowledge, and experience he could see nothing vicious or dangerous about the horses, we are unable to see how knowledge of their viciousness could be imputed to the city. If they were vicious and he knew it, and then voluntarily placed himself where they were liable to kick him, he would be guilty of contributory negligence, which would defeat his right of recovery.

As to the other cause of action, it appears that when the smallpox patient was brought into the building, the appellant, instead of withdrawing, remained there and proceeded to fumigate the unfortunate victim. It does not appear that this was any part of the duty which he was employed or directed to perform. It certainly increased the likelihood of his contracting the disease. If the city

were, in the first instance, liable because its policeman brought this afflicted man into the room where appellant was staying, it would seem clearly that the appellant, by remaining in the room and doing as he did, contributed to the cause of his misfortune. It certainly increased the likelihood of his contracting the disease, and it cannot be said that he would have taken the disease anyhow if he had not so stayed and fumigated the man.

We think that the demurrer to the complaint was properly sustained. The judgment of the lower court is affirmed.

MOUNT, C. J., DUNBAR, and CROW, JJ., concur.

HADLEY, FULLERTON, and RUDKIN, JJ., took no part.

[No. 5406. Decided March 29, 1905.]

FREDERICK E. ELMENDORF, *Respondent*, v. THOMAS
GOLDEN, *Appellant*.¹

BROKERS—ACTION FOR COMMISSIONS—PROCURING CAUSE—EVIDENCE—SUFFICIENCY—EMPLOYMENT OF TWO BROKERS. A broker is entitled to his commissions, as being the efficient procuring cause of the sale, where the property was listed with him for sale, advertised by him, and shown to a customer who received her first knowledge thereof through him, and where he at once advised the owner of the facts, although the customer afterwards inspected the property with another broker to whom the owner sold the property, and who at once conveyed to the plaintiff's customer for a nominal consideration; and there is in such case no employment of two brokers calling for a division of the commissions.

TRIAL—NONSUIT—ERROR CURED BY INTRODUCTION OF EVIDENCE—BROKER'S COMMISSIONS. In an action by a broker for commissions, in which a motion for a nonsuit did not particularly point out that the plaintiff had failed to prove the allegation that defendant had agreed to pay the usual commission of five per cent,

¹Reported in 80 Pac. 264.

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error in overruling the nonsuit is cured by the defendant's proceeding with the case and introducing evidence that the usual commission was five per cent.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered April 19, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for a broker's commissions. Affirmed.

Munter & Jesseph and *Post, Avery & Higgins*, for appellant, cited: *Scott v. Lloyd*, 19 Colo. 401, 36 Pac. 733; *Warvelle, Vendors*, § 27, p. 241; *Thomas v. Merrifield*, 7 Kan. App. 669, 53 Pac. 891; *Stewart v. Woodward*, 7 Kan. App. 633, 53 Pac. 148; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Goldstein v. Walter*, 7 N. Y. Supp. 756; *Ward v. Fletcher*, 124 Mass. 224; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Francis v. Eddy*, 49 Minn. 447, 52 N. W. 42; *Baker v. Thomas*, 33 N. Y. Supp. 613.

Danson & Huneke, for respondent, contended, among other things, that whether a broker is the procuring cause is a question of fact for the jury. *Eggleston v. Austin*, 27 Kan. 245; *Smith v. McGovern*, 65 N. Y. 574; *Livezy v. Miller*, 61 Md. 336; *Bickart v. Hoffmann*, 19 N. Y. Supp. 472.

CROW, J.—Some time prior to the making of the sale hereinafter mentioned, appellant, Golden, listed certain property with respondent, Elmendorf, a real estate broker, for sale at the price of \$5,000, agreeing to pay a commission of five per cent. Respondent immediately advertised the property, and about the middle of November, 1903, one Mrs. Fannie Goldstein, having seen the advertisement, called on respondent to make some inquiries, and the property was shown to her by respondent. She

did not at that time disclose her name, but stated that she wished to consult a friend in whom she reposed confidence in business matters, and that she would see respondent again at an early date. Respondent immediately notified appellant of this interview, and described Mrs. Goldstein with such accuracy as to enable appellant to know her in the event of her calling upon him. A few days later Mrs. Goldstein called upon respondent, gave him her name, stated that her friend to whom she had referred was absent from the city, but that she had another friend whom she would consult in regard to the advisability of purchasing, and promised to see respondent again. This interview was also promptly reported to appellant by respondent.

It is undisputed that Mrs. Goldstein did consult the other friend, a Mr. Ostroski, who, upon thus learning of the property, examined it in company with one Sidney Rosenhaupt, another real estate broker, not theretofore employed by appellant. Rosenhaupt and Ostroski examined the property on the Sunday after the last interview of respondent with Mrs. Goldstein. On the following Monday Rosenhaupt and Ostroski secured an interview with Mr. Golden in which they agreed to purchase the property from him for \$5,000, in the name of Mr. Rosenhaupt, who was to receive a commission of five per cent. At that time Mr. Rosenhaupt paid appellant \$150 cash, and agreed to close the deal as soon as money was received from the east. On the same Monday appellant called upon respondent and notified him that he was selling the property to Mr. Rosenhaupt. Respondent immediately warned appellant that Rosenhaupt had his customer, Mrs. Goldstein, and that, if the property was sold to her, he would hold appellant for his commission. Appellant testified that he made inquiry of Mr. Rosenhaupt, as to whether he was buying the

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property for Mrs. Goldstein, and that Rosenhaupt simply said, "I am buying that property." After receiving the \$150, and before the deal was fully closed, appellant called upon one J. M. Corbet, in regard to a mortgage which Corbet held upon the property, and Corbet testified that, at said time, appellant stated that Mr. Rosenhaupt was buying the property for Mr. Elmendorf's customer. This testimony is not positively denied by appellant.

About ten days later, the deal was closed with Rosenhaupt, appellant making him a deed for the real estate. Rosenhaupt immediately conveyed the property to Mrs. Goldstein. The money paid for the real estate was undoubtedly furnished by Mrs. Goldstein. The deeds were immediately recorded, and appellant in his testimony says: "When I went home that night I read in the papers where I seen it was from Golden to Rosenhaupt for \$5,000, and from Rosenhaupt to Mrs. Goldstein for \$5, and I seen that there was something in it, as Elmendorf had told me." Then appellant denied that he had anything to do with the "game," as he termed it. Respondent immediately notified appellant that he would hold him for his commission. Appellant declined to pay, and this action was commenced to recover the same.

The complaint, in addition to other allegations, contained the following:

"That said Thomas Golden and wife conveyed said property to one Sidney Rosenhaupt, which conveyance was colorable only and intended for the benefit of Fanny Goldstein, and was made to said Rosenhaupt in trust for her, and said Rosenhaupt at once and as a part of the same transaction, and on the 2d day of December, 1903, conveyed said property to said Fanny Goldstein."

The answer consisted of denials only. Upon the trial the jury rendered a verdict for \$250 in favor of respondent, a

motion for a new trial being denied, judgment was entered, and this appeal is taken.

Appellant makes several assignments of error which, however, cover only the following points: (1) That the court erred in denying appellant's motion for a nonsuit, at the close of respondent's evidence, and also in denying defendant's challenge to the sufficiency of the evidence, and motion for judgment at the close of all of the evidence in the case; (2) that the court erred in giving certain instructions to the jury.

In order that a broker may be entitled to recover compensation for his services, it is a well established principle of law that two facts must appear; first, that he was employed to make the sale; and second, that in pursuance of his employment he found a purchaser in a situation ready, able and willing to complete the purchase on the terms specified. In order that a broker may earn his commission he must be the efficient procuring cause of the sale. There is no question but that the customer, Mrs. Goldstein, was found through the efforts of respondent; that he first showed her the property; that she knew nothing of it until her attention was called to it by him; and that he immediately notified Golden of his interview with her, and that shortly afterwards she purchased the property. Appellant claims respondent is not entitled to recover because he did not complete the sale, and because the sale was in fact made by Mr. Rosenhaupt, another broker. In support of his position appellant cites a number of authorities, and invokes the following doctrine:

"Where several brokers are avowedly employed, the entire duty of the vendor is performed by remaining neutral between them, and he will have the right to make the sale to a buyer produced by any of them without being called upon to decide between the several agents as to which of them was the procuring cause."

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The difficulty with appellant's position is that, in all cases cited by him, where the facts are shown, it affirmatively appears that both brokers had been previously employed by the owner and were competing. Here respondent only had been employed, and Rosenhaupt did not appear in any manner, until after he had secured possession of respondent's customer, through the acts of Mr. Ostroski, the friend or agent of Mrs. Goldstein; and, if he was ever employed by appellant, it was after appellant knew respondent was negotiating a sale with Mrs. Goldstein, and at the time when appellant had no reason to suppose such negotiations had ceased. We do not think the facts in this case show there were two brokers employed to sell the property, as contemplated in the authorities cited by appellant. In *Dowling v. Morrill*, 165 Mass. 491, 43 N. E. 295, the supreme court of Massachusetts distinguishes the case of *Wood v. Fletcher*, 124 Mass. 224, one of the authorities cited by appellant, and, upon facts strikingly similar to those involved here, held the broker occupying respondent's position was entitled to recover. The questions of fact as to whether respondent was employed by appellant, and whether he found a purchaser in a situation ready, able and willing to complete the purchase on the terms specified, were fairly submitted, and the jury found in favor of respondent. We think the evidence sustains the verdict on such issues, and that the verdict should not be disturbed.

In support of his motion for a nonsuit, appellant contends that respondent in his complaint alleged an agreement to pay the usual commission of five per cent; that this allegation was denied; and that no proof in support of the same was introduced in respondent's opening case. It is true that the record discloses no evidence on this issue as having been offered by respondent in his opening case. The record, however, fails to show that this point was

called to the attention of the trial court in the argument on the motion for a nonsuit, or that it was at the time stated as one of the grounds for the motion. In all probability, if it had at the time been called to the attention of respondent and the court, respondent would have asked and have been granted permission to introduce such evidence. Be that as it may, the motion was denied, and thereupon, appellant introduced his evidence. In doing so, he produced testimony sufficient to show that the usual commission was five per cent, or \$250. In *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982, this court speaking through Fullerton, J., said, at page 416:

"It is also immaterial whether or not the trial court erroneously refused to grant a nonsuit. By going on with the trial and introducing evidence on their behalf, the appellants waived any technical advantage they might have availed themselves of by such a motion. Of course, if the evidence of the respondent did not at that time warrant a recovery and the defect in the evidence was not subsequently supplied, the appellants can now successfully urge that the evidence before the court is insufficient to justify the findings and judgment, but the court must look to the whole of the evidence to ascertain that fact, not alone to the evidence of the respondent."

If appellant, in his motion for a nonsuit, was relying upon the absence of this evidence he could have rested his case and proceeded no further. But instead of doing so, he introduced evidence sufficient to supply any omission in this regard upon the part of respondent. We think the rule announced in *Port Townsend v. Lewis*, *supra*, should apply, notwithstanding this was a jury trial. It is our view that, on the entire record, the court did not err in denying the challenge to the evidence and the motion for judgment, and that, if there was any error in denying the motion for a nonsuit, the same was afterwards cured, and appellant is in no way prejudiced.

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The only other error assigned is that the court erred in the giving of certain instructions. This assignment is not discussed by appellant. We have examined the instructions, and think they were fair and free from error. The case was properly submitted to the jury, and fairly tried. The judgment of the superior court is affirmed.

MOUNT, C. J., RUDKIN, DUNBAR, and ROOT, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 5161. Decided March 29, 1905.]

*In the Matter of the Estate of JONATHAN G. CLARK,
Deceased.*¹

WILLS—INHERITANCE TAX—EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATION—COMITY—JUDGMENTS—CONCLUSIVENESS OF DISTRIBUTION—INHERITANCE TAX CHARGEABLE TO LEGATEES. Where a resident of the state of Maine died, leaving estate there and in the state of Washington, and his will was probated there, and all legacies to collateral heirs and strangers to the blood and all the debts were, by order of the probate court in Maine, paid out of the estate situated in that state, leaving the property in this state to be divided between his widow and son under the residuary clause in the will, the estate in the state of Washington is not chargeable with the increased inheritance tax upon legacies to collateral heirs and strangers to the blood at the rate of 3 and 6 per cent, under Laws 1901, p. 67; since comity requires that full faith and credit be given to the proceedings in the probate court in Maine, ordering those legacies to be paid out of the estate within its jurisdiction and under its control, and such order is conclusive on the courts of this state; and since the inheritance tax is to be deducted from the legacies and paid by the legatees, and the executor in this state has no opportunity to collect the same from the legatees chargeable therewith.

Appeal from a portion of a decree of the superior court for Spokane county, Kennan J., entered March 30, 1904,

¹Reported in 80 Pac. 267.

ordering the payment of an inheritance tax, upon hearing the final account of the executor. Reversed.

W. J. Thayer, for appellant.

W. B. Stratton, Attorney General, *E. W. Ross*, and *C. C. Dalton*, for respondent.

PER CURIAM.—On the 21st day of April, 1902, Jonathan G. Clark, a resident of Penobscot county, in the state of Maine, died testate, leaving an estate in the state of Maine of the appraised value of \$118,268.60, and an estate in the state of Washington of the appraised value of \$101,082.32. The entire indebtedness against both estates was \$36,203.85. By the terms of his will the testator devised to his wife, for life, the homestead in the state of Maine, of the appraised value of \$10,000 and also the income from two other parcels of property in the state of Maine, of the appraised value of \$32,000. He next bequeathed to his wife and son the sum of \$50,000, share and share alike, and directed that all policies of insurance on his life should go equally to his wife and son in part payment of such legacies, and that the balance should be made up in money or property, real or personal, at prices fixed by the appraisers appointed by the probate court. The will expressly provided that the legacies to his wife and son should have priority over all other gifts or legacies provided for therein. He next bequeathed sums aggregating \$20,000 to collateral heirs within the third degree, and further sums aggregating \$18,200 to collateral heirs beyond the third degree and to strangers to the blood, and the further sum of \$2,000 in trust for the use of a grandson of the testator. The residue, after the payment of debts and expenses of administration, he devised and bequeathed to his wife and son, share and share alike. The wife, Anna S. Clark, the son, Francis Lewis Clark, and a

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nephew, Joseph G. Blake, were named as executors. On the 27th day of May 1902, this will was duly admitted to probate in the probate court in the county of Penobscot, in the state of Maine, and Anna S. Clark, Francis Lewis Clark, and Joseph G. Blake were appointed executors thereof. Thereafter a copy of said will, and the original record of the probate thereof, duly authenticated and attested, were filed in the superior court of Spokane county in this state, and on the 17th day of June, 1902, an order was made in said court admitting the will to probate, and appointing Francis Lewis Clark sole executor thereof, the other two executors being nonresidents of this state. In the regular course of administration, the executors appointed by the probate court in the state of Maine, acting under the direction and with the approval of that court, paid all indebtedness against the estate, and all bequests and legacies to collateral heirs and strangers to the blood, out of the property and funds belonging to the estate of the testator, within the state of Maine, and subject to the jurisdiction of the probate court of that state, thus leaving the entire estate within the state of Washington to pass to the widow and son in satisfaction of the \$50,000 legacies, and under the residuary clause of the will. The executor tendered to the state treasurer of this state the sum of \$743.99, in full of the inheritance tax due the state, pursuant to Laws of 1901, p. 67. This amount is one per cent of the appraised value of the estate here, less the \$10,000 exemption and the pro rata portion of the indebtedness chargeable to the estate within this jurisdiction. The executor filed his final account, setting forth the above facts, and prayed that said account be settled and allowed, and that the residue of the estate be distributed to the parties thereto by law entitled. The state treasurer appeared and filed exceptions to the final account, claiming

that, under the terms of the will, the legacies to collateral heirs and strangers to the blood were properly chargeable to and payable out of the estate here, and that the inheritance tax should be computed and paid out of the legacies to such collateral heirs and strangers to the blood, as provided by the above act. The court below, at the hearing on the final account, sustained the exceptions, and directed the executor to pay to the state treasurer the sum of \$1,309.99, in addition to the sum of \$743.99 theretofore paid. The final account was thereupon settled and allowed, and the entire estate within the state of Washington was distributed to the widow and son, or to their successors in interest. From the above order directing the payment of such additional sum, on account of the inheritance tax, the executor has appealed.

We do not think that the claim of the state treasurer can be upheld. The inheritance tax is payable out of the legacies, and is chargeable to the individual legatees. The court cannot compel one legatee to pay the inheritance tax due from another, and yet, such is the effect of the order appealed from. The estate of the testator within the state of Maine was administered by a court of competent jurisdiction. Comity requires us to give full faith and credit to the proceedings had in that court, and we must presume that its proceedings were in accordance with the laws of that state. In other words, when the probate court there authorized or directed the payment of the legacies to collateral heirs and strangers to the blood out of the estate within its jurisdiction and under its control, we must presume that its authority was rightfully exercised, and cannot hold the executor here, or other legatees, responsible for the errors of that court. The executor in this state had no opportunity to collect the inheritance tax from the collateral heirs and strangers to the blood, and this court will

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not compel him to pay such tax out of his own funds, or out of the funds belonging to other heirs or legatees. The fact that the same persons acted as executors in both states, or the fact that the executors were beneficiaries under the will, can make no difference. The probate court in the state of Maine, not its officers or legatees under the will, is responsible for the method of administration pursued, and the judgment of that court we have neither the power nor the disposition to review.

The order of the court below is therefore reversed, with directions to approve the final account as rendered, in so far as the claim of the state of Washington is concerned.

[No. 5156. Decided March 29, 1905.]

FREDERICK KAKELDY, *Appellant*, v. THE COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Respondent*.¹

RAILROADS—NUISANCE—STREETS—AUTHORITY TO USE—ACQUISITION OF ABUTTING OWNERS—VACATION OF STREET. An abutting owner who purchased his lot after the vacation of part of the street and the construction there of a railroad track, and acquiesced for years in the operation and improvement of the railroad, cannot object to the operation of the road as a public nuisance, because of want of original authority to use the street, since the street had been vacated, and since the company, as a common carrier, possessed of the right of eminent domain, was under obligation to continue its duties to the public as such.

MUNICIPAL CORPORATIONS—STREETS—VACATION—DISCRETION OF CITY COUNCIL. The vacation of a street is a legislative question and within the discretion of the city council, and will not be disturbed in the absence of an abuse of discretion, or where the owners of abutting property may have requested such vacation.

SAME—BURDEN OF PROOF AS TO CHARACTER OF STREET—VACATION—PLEADING—AMENDMENT OF ANSWER. In an action to enjoin the use of a public street for railway purposes, in which the

¹Reported in 80 Pac. 205.

answer denied that the place was a public street, the burden of proof as to that fact is upon the plaintiff, and hence it is not error to permit a trial amendment to the answer setting up an ordinance vacating the place as a street prior to its use for railway purposes, the vacation being a matter of public record.

RAILROADS—ACQUIESCENCE OF LAND OWNER IN CONSTRUCTION—DAMAGES—INJUNCTION—ESTOPPEL. After acquiescence in the construction and operation of a railroad, the remedy of a land owner is limited to compensation in damages, and he is estopped to enjoin its operation.

SAME—TRESPASS—DAMAGES NOT RUNNING WITH LAND—SUBSEQUENT PURCHASERS. Damages to a land owner, by the construction and operation of a railroad by a common carrier possessing the power of eminent domain, are in the nature of compensation for a trespass and do not run with the land, and his grantee takes the land subject to the burden, and cannot enjoin the operation of the road.

SAME—EVIDENCE OF DAMAGE TO SUBSEQUENT PURCHASER. A party purchasing land after the construction of a railroad thereon, suffers no injury from the fact that the trains were thereafter heavier and the track had been standardized by spreading the rails upon the same ties, no more land being occupied.

Appeal from a judgment of the superior court for King county, Joiner, J., entered December 11, 1903, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to enjoin the operation of a railroad upon land claimed by plaintiff. Affirmed.

H. E. Foster, for appellant.

C. H. Farrell and *Piles, Donworth & Howe*, for respondent.

HADLEY, J.—This action was brought to enjoin the defendant from operating its trains upon its railway track, along what is alleged to be a portion of Eighth avenue south, in the city of Seattle. It is averred that said avenue is a public street, and that a lot owned by the plaintiff abuts thereon, and, further, that a part of the objectionable

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place of operation is upon a portion of plaintiff's lot. It is alleged that the defendant unlawfully, and without right or authority, has constructed and is operating its road at said place, thereby obstructing the plaintiff's access to his premises, and otherwise damaging his property. In addition to an injunction, he demands damages.

The amended answer alleges that, more than twenty years prior to the commencement of the action, the defendant and its predecessors entered into the adverse possession of the premises described in the complaint, as now occupied by the defendant, constructed a railroad thereon, and ever since said time have been in the actual, open, and notorious possession thereof; that, if the plaintiff ever acquired title to any part of the lot described in the complaint, it was acquired by purchase after the construction of said railroad, and with full knowledge, at the time he so acquired it, that the defendant was in possession of the land occupied by its track and roadbed, and was engaged in operating its road at said place; that for more than ten years the plaintiff stood by and saw defendant operate and improve its railway, and made no protest against its doing so; by reason of which he is now estopped from maintaining the action. It is further averred that, by ordinance of the city of Seattle, passed June 15, 1886, and published the following day, the city vacated that portion of said street upon which the plaintiff's property abuts, and that, if the plaintiff ever acquired title to any part of the lot, it was acquired by purchase long after the enactment of said ordinance. The cause was tried by the court without a jury, resulting in a judgment denying an injunction, and dismissing the action. The plaintiff has appealed.

It is first urged that the court erred in overruling the appellant's demurrer to the second and third defenses of

respondent's answer. It is argued that the averments of the answer show that the railroad and its operation constitute a public nuisance, in that it is not made to appear that the respondent has at any time been authorized to use the street. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362, is cited as authority for this contention. That case is unlike the one at bar in important particulars. In the case at bar the respondent is a quasi public corporation, a common carrier, possessing the power of eminent domain. Its railroad was built and in operation before appellant purchased his property. He purchased the property with knowledge of the existence and operation of the railroad, stood by and saw it operated and improved, without objection, and then, after the lapse of years, brought this suit to enjoin its operation. In the *Schwede* case the plaintiff brought the suit against a private corporation, not shown to possess the power of eminent domain, to enjoin the threatened construction of a private railroad spur in what the court found was a public street. In the case at bar the place where respondent's railroad was constructed is not a public street, if, as the answer alleges, it has been vacated. Other authorities cited by appellant relate to locations admittedly in public streets.

It is contended that the city had no authority to vacate the street and deprive an abutting property owner of access to his property. Appellant was not at that time an abutting owner. The question whether the street should be vacated or not was one for legislative decision, resting with the city council. Discretion in the premises was vested in the council, and, unless that discretion was abused, the courts will not interfere. *Elliott, Roads and Streets* (2d ed.), § 879. For aught that appears, the then abutting owners may have requested the city to vacate the street. We think the court did not err in overruling the demurrer to the answer.

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Error is urged upon the action of the court in striking certain interrogatories, submitted by appellant for respondent to answer. They related chiefly to the original authority by which respondent occupied the place mentioned with its railroad. We think no prejudicial error resulted from striking the interrogatories. The fact was already known to appellant that respondent had, for many years, occupied the ground for the operation of a railroad, as a common carrier. It was, therefore, under duties and obligations to the public to continue the operation, and those duties it could neither evade nor discontinue. *State ex rel. Grinsfelder v. Spokane Street R. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515. Appellant cannot, therefore, invoke the method of original occupancy by respondent as a ground for abating the operation of the road on the theory that it is a nuisance.

It is assigned that the court erred in permitting respondent to file an amended answer at the time the cause was called for trial. The modification of the original answer consisted in pleading the ordinance vacating the street. The complaint alleged that it was a public street, and the original answer denied this. The burden of proving that it was a public street was, therefore, upon appellant, and we are unable to see that he was surprised or prejudiced by the introduction in the pleadings of matter which was of public record, and of which he was required to take notice when he alleged that the place was a public street. In any event, the record discloses no such showing as convinces us that the court abused its discretion in permitting the amendment.

The principal contention is that the court erred in refusing to grant the injunctive relief and damages asked. The evidence establishes that an ordinance of the city

council, regularly passed in 1886, declared the street at said place vacated. Appellant purchased the property more than one year after the ordinance of vacation was in effect, and long after the location and construction of the railroad. The deeds under which he claims title are in evidence. They contain no transfer to him of any right of action which his grantor may have had against the railroad company, if he had any such. An owner of land, who stands by and without protest sees a railroad constructed thereon, is estopped thereafter to maintain an action in ejectment, or a suit for injunction, to prevent the operation of the road. His remedy is limited to an action for damages for his compensation. *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *McAulay v. Western Vermont R. Co.*, 33 Vt. 311, 78 Am. Dec. 627; *Provoll v. Chicago etc. R. Co.*, 57 Mo. 256; *Dodd v. St. Louis etc. R. Co.*, 108 Mo. 581, 18 S. W. 1117.

The right of action for the damages, in such a case, belongs to him who was the land owner at the time the railroad company took possession and constructed its road, and his grantee takes the land subject to the burden of the railroad. Such damages, being in the nature of a compensation for trespass, constitute a personal claim in favor of the owner at the time the injury occurred, and they do not run with the land. *Roberts v. Northern Pac. R. Co.*, *supra*; *McFadden v. Johnson*, 72 Pa. St. 335, 13 Am. Rep. 681; *Chicago etc. R. Co. v. Engelhart*, 57 Neb. 444, 77 N. W. 1092; *Maffet v. Quine*, 93 Fed. 347; *Northern Pac. R. Co. v. Murray*, 87 Fed. 648.

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to pay-

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ment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession." *Roberts v. Northern Pac. R. Co.*, *supra*, at page 10.

A similar question was considered in *Schuylkill etc. Nav. Co. v. Decker*, 2 Watts (Pa. St.) 343. The court said:

"To the parties proposed to be made defendants, it is a decisive objection that they have not a title to the damages which being in compensation of an injury in the nature of a trespass, could not pass by a conveyance of the land."

It follows that, even if a right to damages ever existed here in favor of the original owner, the appellant cannot recover, since he is not the assignee of such right of action. The court also found that the operation of the road is now substantially as it was when appellant purchased his lot, except that the trains are heavier, and that the track has been changed from narrow to standard gauge. It was also found that, in standardizing the road, no more land was occupied than before, for the reason that the rails were simply spread upon the same ties. These findings are justified by the evidence. We therefore think appellant has not shown any right of action in his favor.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

[No. 5405. Decided March 29, 1905.]

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OKANOGAN COUNTY *et al.*, Appellants, v. EDITH M.
CHEETHAM, Respondent.¹

HIGHWAYS—OVER PUBLIC LANDS—GRANT OF CONGRESS—CONSTRUCTION—ACCEPTANCE BY USER—COUNTY COMMISSIONER'S ACCEPTANCE. U. S. R. S. §2477, granting a right of way for the construction of highways over public lands, is a grant *in praesenti* becoming effective upon user by the public without any formal action on the part of the state; and actual continuous user for seven years by the general public before entry by a homesteader, constitutes such acceptance of the grant; and an acceptance by the county commissioners under Laws 1903, p. 155, is not necessary, that act providing that nothing therein contained shall invalidate "acceptance of such grant by general public use."

SAME—PRESCRIPTION. In such a case, the ten years user required for prescription is not essential, as it is not a question of prescription, but one of acceptance of a grant.

Appeal from a judgment of the superior court for Okanogan county, Martin, J., entered May 24, 1904, dismissing an action to establish a highway and enjoin obstruction thereof, upon sustaining a demurrer to the complaint. Reversed.

E. K. Pendergast, for appellants, contended, among other things, that U. S. Revised Statutes, § 2477, grants an absolute right of way *in praesenti*. *Wells v. Pennington County*, 2 S. D. 1, 48 N. W. 305; *Smith v. Pennington County*, 2 S. D. 14, 48 N. W. 309; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341; *Id.*, 11 Rose's Notes, U. S. Rep., 895; *Jamestown etc. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568; *Noble v. Union River Log. R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271. The grant was accepted by the actual location and user of the road, prior to respondent's homestead settle-

¹Reported in 80 Pac. 262.

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Citations of Counsel.

ment. *Denver etc. R. Co. v. Alling*, 99 U. S. 463; *Dakota Cent. R. Co. v. Downey*, 8 Land Dec. 115; *Cincinnati v. White*, 6 Peters 431, 8 L. Ed. 452. The respondent took subject to the prior use by the public. *Simonson v. Thompson*, 25 Minn. 450; *Colman v. St. Paul etc. R. Co.*, 38 Minn. 260, 36 N. W. 638; *St. Joseph etc. R. Co. v. Baldwin*, 103 U. S. 426. Prior to the issuance of the patent, she acquired no vested rights that she could assert against the government to prevent its conveyance for other purposes. *Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Washington etc. R. Co. v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219; 10 Rose's Notes, U. S. Rep., 71; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98; *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794; *Tarpey v. Madsen*, 178 U. S. 215, 20 Sup. Ct. 849; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9.

Alvin W. Barry, for respondent, contended, among other things, that the respondent, by virtue of her entry and occupancy, became possessed of the land, subject only to the reserved rights of the United States. *Weber v. Laidler*, 26 Wash. 141, 66 Pac. 400; *Thredgill v. Pintard*, 12 How. 24; *Tarpey v. Madsen*, 178 U. S. 215, 20 Sup. Ct. 849; *Kinman v. Appleby*, 32 Land Dec. 526; *Lang v. Morey*, 40 Minn. 396, 42 N. W. 88, 12 Am. St. 748; *Wilcox v. John*, 21 Colo. 367, 40 Pac. 880, 52 Am. St. 246; *Skinner v. Reynick*, 10 Neb. 323, 6 N. W. 369, 35 Am. Rep. 479. This entitled her to notice and hearing in any proceeding instituted for the establishment of a highway, and also to compensation for the land appropriated. *Yakima County v. Tullar*, 3 Wash. T. 393, 17 Pac. 885; *Wendel v. Spokane County*, 27 Wash. 121, 67

Pac. 576. Something more than mere user is required to establish a highway. Bal. Code, §3846; *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748; *State v. Horn*, 35 Kan. 717, 12 Pac. 148; *Fox v. Virgin*, 5 Ill. App. 515. Grants of rights of way by act of Congress for railway purposes have frequently been held to carry the fee, upon the designation or completion of the road, and it is in such cases only that congressional grants take effect *in praesenti*. *McAlpine v. Chicago Great West. R. Co.*, 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85; *Missouri etc. R. Co. v. Roberts*, 152 U. S. 114, 14 Sup. Ct. 496; *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243; *New Mexico v. U. S. Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128. A right of way for road purposes does not carry with it the fee. *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879; *Dubuque v. Mahoney*, 9 Iowa 450; 15 Am. & Eng. Ency. Law, 415, 416. A public highway is one that is under the control of, and kept up by, the public and cannot be made such by resolution. *Kennedy v. Williams*, 87 N. C. 6; *Kinnare v. Gregory*, 55 Miss. 612; *Baldwin v. Herbst*, 54 Iowa 168, 6 N. W. 257; *Commonwealth v. Petitcler*, 110 Mass. 62.

Root, J.—This action was brought by the county of Okanogan and its board of commissioners against respondent, to have a certain “strip of land sixty feet in width . . . adjudged and decreed to be vested in the general public, and in plaintiffs for the use and benefit of the general public, as a public highway and wagon road,” and to enjoin respondent from in any manner interfering with or obstructing said highway, and to abate certain fences erected by respondent across said right of way, and to perpetually enjoin her from setting up or claiming any right, title, or interest in and to any of said strip

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of land, as against the general public in its use of the same as a public highway and wagon road. To appellants' complaint, a general demurrer was interposed, and, by the trial court, sustained. Appellants electing to stand upon their complaint, the action was dismissed. From the judgment of dismissal, appeal is taken to this court.

Respondent, on or about the 19th day of December, 1901, made original homestead entry upon the lands across which the wagon road in controversy runs. For seven years or more prior to said date, the roadway herein involved had been continuously used as a public highway by people living in that part of the country; but no public funds had ever been expended thereupon—the road having been laid out and improved and kept up by voluntary work and expense. On the 11th day of August, 1903, the board of county commissioners of Okanogan county adopted and entered a resolution to the effect,

"That the right of way for the construction of highways over public lands, as granted by act of Congress (§ 2477, Revised Statutes) be and the same is hereby accepted, as far as said grant relates to said Okanogan county, state of Washington; that is to say, to the extent of thirty feet on each side of the center line of all wagon roads which now exist, or which have heretofore existed, upon or across or over lands that are now public lands of the United States, not reserved for public uses in said Okanogan county."

This resolution was adopted in view of the act of the legislature of this state, approved March 14, 1903, wherein and whereby boards of county commissioners are authorized to accept highways, as granted by § 2477 of the Revised Statutes of the United States. Laws 1903, p. 155. This resolution of the board of commissioners seems to have been adopted without notice to this respondent. Appellants contend that § 2477 of the Revised Statutes

constitutes a grant *in praesenti*, and that it becomes effective as to any particular strip of land as soon as the same is used for highway purposes, and without any formal action on the part of the state, county, or other authorities. Respondent contends that, as her homestead entry was made before this strip had been used as a highway for the period of ten years, and before the county commissioners had adopted the resolution referred to, she had rights paramount to those seeking to use said strip as a highway, and that the action of the public in using said roadway, and the action of the county commissioners in adopting said resolution, were insufficient to deprive her of the right of control over said strip of land. Relying upon this contention, she had caused a fence to be erected across said roadway, thereby preventing the use of the same for travel. Section 2477 of the Revised Statutes, above referred to, is as follows: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The exact questions presented by this record have not heretofore been adjudicated in this court. But questions quite similar claimed the court's attention in the case of *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858—the main distinction between that case and this being that in said case the road in question had been in use for a period of ten years prior to the homestead entry, while here it was only seven. Referring to § 2477, and the question of the establishment of highways by prescription and user, this court, speaking by Chief Justice Gordon, said:

"In this state the establishment of highways by prescription is recognized, and roads may be established by use as well as by proceedings under the statute. It is a well known fact that many of the public highways in this state had their inception in adverse user, which ripened

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into prescription. The act of Congress already referred to does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located; and in this state, as already observed, such highways may be established by prescription, dedication, *user*, or proceedings under the statute. Any other conclusion would occasion serious public inconvenience."

It will be noticed that the right to establish a highway by "user" is here expressly avowed.

The United States supreme court, in construing many of the grants of land made to railway companies, has invariably held that the same were grants *in praesenti*, and that they attached to the land as soon as definite location was established. In the case of *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, that court, speaking by Mr. Justice Field, said:

"The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in praesenti*. The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act. . . . This is the construction given by this court to similar language in other acts of Congress. *Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry. Co.*, 97 U. S. 491; *Leavenworth, Lawrence & Galveston Ry. Co. v. United States*, 92 Id. 733. . . . Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them.

On the contrary, their value would be greatly enhanced thereby."

The foregoing was said by the court with reference to the sections of land granted—the act providing that, where portions of land should be settled upon before the location of the road, other lands should be given the railway company in lieu thereof; and, in the same opinion, in speaking of the "right of way," the court held that, when the location was definitely made, the title should date from the passage of the act, even though settlers may have rightfully entered said lands under the laws of the United States in the meantime—the court saying:

"We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

The decisions of said court in many other cases are of like import.

In considering said §2477, the supreme court of South Dakota, in the case of *Wells v. Pennington County*, 2 S. D. 1, 48 N. W. 305, 39 Am. St. 758, said:

"The language of section 2477, Revised Statutes of the United States, indicates a grant *in praesenti*. Its words: 'The right of way for the construction of highways over public lands not reserved for public use is hereby granted,'—import an immediate transfer of interest, not a promise of a transfer in the future. As to the intent of Congress in this enactment granting the right of way to cross the public lands there can be no reasonable doubt. The object of the grant was to enable the citizens and residents of the states and territories where public lands belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads was made by competent authority or by public use, the dedication took effect by relation as of the

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date of the act; the act having the same operation upon the lines of the road as if specifically described in it."

In the case at bar, the respondent urges that there is a distinction between grants of lands and rights of way to railways, and the grant of highways in said § 2477, in that those to the railway companies conveyed the fee, whereas the grant for the construction of highways in § 2477 authorizes merely an easement. In the case last cited, the court addresses itself to this proposition, in the following language:

"While in these grants the fee to the land was intended to be transferred to the railroad companies by their grants and the act under consideration [said § 2477] is only a dedication or giving a right of way, yet the principles governing the construction of the words 'is hereby granted' are the same."

After citing many cases, the court further says:

"The foregoing were cases of grants to railroad companies, but . . . the principles therein enunciated are applicable to all similar congressional grants."

In the case at bar, it is contended that user is not sufficient to establish a highway across public lands which are subsequently entered under the homestead law, and that the grant is not an absolute grant, but a conditional one which must be accepted by the proper authorities, and that, when not accepted until a homesteader's rights intervene, said homesteader may assert control over the land until proper steps are taken to establish the highway, as other highways are established. Objections similar to this were raised in the case last cited. Among other things, the court said:

"The parties to a dedication are the owners and the public; and it must be remembered that the public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration

to support them. . . . It may, however, be admitted that the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; . . . *Railroad Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341."

As to user by the public constituting an acceptance of a dedication for highway purposes, the "Cyc.," Val. 13, at page 165, says:

"An offer of dedication, to bind the dedicator, need not be accepted by the city or county, or other public authorities, but may be accepted by the general public—to deny this would be to deny the whole doctrine of dedication. The general public accepts by entering upon the land and enjoying the privileges offered—or briefly, by user. Except when user is relied on to raise a presumption of dedication the duration of the user is wholly immaterial. It is not necessary that such user should continue any definite length of time. . . ."

In the case at bar, the general public having used this highway for a period of seven years before respondent entered the land as a homesteader, we think such user constituted an acceptance of the grant made by Congress in § 2477. We do not think there was a necessity of said user existing for a period of ten years. It is not a matter of prescription, but of acceptance of a grant. Under the authorities cited, and many others bearing upon the same question, there can be little question about this grant having been one *in praesenti*. The resolution adopted by the board of county commissioners we do not think essential to an acceptance. The public had already accepted by actual, continuous user. The board's action was, however, appropriate as indicating the extent of the land to be claimed for the highway which had already been thus established. The statute authorized the county commissioners to accept a strip of land not less than thir-

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ty nor more than sixty feet in width. The resolution accepted all such grants within the county to the extent of sixty feet in width. In the statute of March 14, 1903, above referred to, the section authorizing the commissioners to accept the rights of way granted by Congress in § 2477, has this proviso:

“Provided, That nothing herein contained shall be construed to invalidate the acceptance of such grant by *general public use and enjoyment*, heretofore or hereafter had.”

This language indicates clearly that the legislature was acting upon the theory that the grant of Congress could be accepted by “general public use and enjoyment.” Consequently, there was nothing in this statute controverting the doctrine of acceptance by user. It would seem to be appropriate that homesteaders and other claimants upon government land, across which highways have been established by user, should be heard as to the amount of land taken when the county assumes control of these roads. In the case of *Yakima County v. Conrad*, 26 Wash. 155, 66 Pac. 411, wherein the facts were somewhat similar to those herein, the court fixed the width of the road at forty feet. That case was prior to the statute of 1903, and of course the commissioners had not adopted any such resolution as was done in the case at bar.

We do not think there is anything to prevent the respondent in this, or any similar case, from appearing before the county commissioners, and being heard upon the question of reducing the width of the highway to less than sixty feet, and nothing to hinder the commissioners from considering and acting upon a petition of such a party, and granting the same, if, in their judgment, the interests of the county and public would be subserved by a highway of less width. It could not, however, be reduced to

less than thirty feet. In the settlement of the public lands in a young state, it is necessary, frequently, that highways be laid out across the public domain; and it was in recognition of this necessity that Congress enacted § 2477. The very nature of conditions in an unsettled, or sparsely settled, locality is such that roadways must be frequently laid out by the early settlers without much regard to section lines, or to the location of future homesteads or other claims. When these roadways become used generally by the public as highways, it would be unreasonable and inconsistent to hold that any action should be required of the authorities in order to constitute an acceptance of the grant of Congress made as aforesaid. There is, of course, nothing to prevent making changes in their location in the same manner as such are made in other public highways.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint, and to proceed with the case in a manner not inconsistent with this decision.

MOUNT, C. J., CROW, RUDKIN, and DUNBAR, JJ., concur.

FULLERTON and HADLEY, JJ., took no part.

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Opinion Per Curiam.

[No. 5399. Decided February 18, 1905.]

STATE OF WASHINGTON, *Respondent*, v. H. C. LITTOOY, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Kennan, J., entered June 24, 1904, upon a trial and conviction of the offense of running a dental office without a license. Reversed.

John R. Parker and *E. J. Brown*, for appellant.

Samuel R. Stern, for respondent.

PER CURIAM.—Appellant was prosecuted upon an information charging him with “the crime of owning, running and managing a dental office or department in the state of Washington, without a license.” From a judgment of conviction in the superior court, he appeals to this court.

The facts in this case are similar to those involved in the case of *State v. Brown* (No. 5396), *ante* p. 97, 79, Pac. 635, just decided and are controlled by the same legal considerations. Upon the authority of that case, the judgment of the honorable superior court in this case is reversed, and the cause remanded with instructions to dismiss the action.

[No. 5400. Decided February 18, 1905.]

STATE OF WASHINGTON, *Respondent*, v. H. C. LITTOOY, *Appellant*.²

Appeal from a judgment of the superior court for King county, Kennan, J., entered May 13, 1904, upon a trial and conviction of the offense of practicing dentistry without a license. Affirmed.

John R. Parker and *E. J. Brown*, for appellant.

Samuel R. Stern, for respondent.

PER CURIAM.—Appellant was prosecuted upon an information charging him with “the crime of practicing dentistry without a license,” in that he did “treat a disease and lesion of the human teeth, and did correct malpositions of the human teeth and jaws, of one R. A. Netzer,” in violation of the provisions of the “Dental Law” (Laws of 1901, pp. 314-318). From a judgment of conviction, he appeals to this court.

¹Reported in 79 Pac. 1135.

²Reported in 79 Pac. 1135.

Appellant attacks the validity of the said dental law, and also alleges that his case was not placed regularly on the trial calendar, in the superior court, and that he was not allowed the statutory time within which to plead. To these contentions this court has passed adversely in other cases containing substantially the same facts. *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash, 492, 72 Pac. 110; *In re Thompson*, 36 Wash. 377, 78 Pac. 899; *State v. Sexton*, ante p. 110, 79 Pac. 634, just decided; *State v. Brown* (No. 5397), ante p. 106, 79 Pac. 638, just decided.

The judgment of the trial court is affirmed.

[No. 5192. Decided February 28, 1905.]

W. B. GILL, *Respondent*, v. NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 19, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries received by a seaman in falling through an open hatch, while in the defendant's employ. Affirmed.

Bausman & Kelleher, for appellant.

PER CURIAM.—The only question presented on this appeal relates to the jurisdiction of the state courts in maritime contracts. This question was decided adversely to the appellant in *Ransberry v. North American Transp. & Trad. Co.*, 22 Wash. 476, 61 Pac. 154. We are now asked to reconsider and overrule that case upon this point. No new authorities are cited and no reason presented which was not considered on that appeal. We are satisfied with the decision therein rendered. The judgment is therefore affirmed.

¹Reported in 79 Pac. 778.

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Opinion Per Curiam.

[No. 5301. Decided March 23, 1905.]

WILLIAM H. COWLES, *Respondent*, v. UNITED STATES FIDELITY &
GUARANTY COMPANY, *Appellant*.¹

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered November 14, 1903, in favor of the plaintiff, upon discharging the jury after a trial on the merits. Affirmed.

Danson & Huneke, for appellant.

H. M. Stephens, for respondent.

PER CURIAM.—This is an action upon a bond of a guaranty company, for damages growing out of the violation of a building contract. The case was before this court before, and an opinion rendered thereon is reported in 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838, where a statement of facts involved can be found. Upon the termination of the evidence in the cause, the case was taken from the jury and judgment rendered for the plaintiff. This appeal is from such judgment.

We have carefully examined the briefs filed in this case, and also the record, and from the record are not inclined to interfere with the discretion of the court in relation to the amendments to the answer sought to be made by the appellant. From the announcement by this court upon the former trial of this cause, that whatever was binding upon the parties to the contract was binding upon the surety, who becomes a party to the contract, identified with the contractor, and the further announcement that, in the absence of a showing of some damage, deviations should not be allowed to avoid the contract, or the policy of insurance which became a part of it—which has been the uniform holding of this court in many cases—we think the court's construction of the pleadings was correct, and the judgment will therefore be affirmed.

¹Reported in 79 Pac. 1134.

[No. 5081. Decided March 23, 1905.]

HANNAH O'CALLAGHAN *et al.*, Appellants, v. TERENCE O'BRIEN,
as Administrator *etc.*, *et al.*, Respondents.¹

In the Matter of the Estate of JOHN SULLIVAN, Deceased.

Appeal from an order of the superior court for King county. Bell, J., entered March 12, 1903, refusing to vacate an order allowing \$1,500 as fees to an administrator's attorney, after a hearing on the merits. Reversed.

Piles, Donworth & Howe, for appellants.

James J. McCafferty and J. W. Robinson, for respondents.

PER CURIAM.—This appeal is from an order denying a motion to vacate an order allowing \$1,500 to J. J. McCafferty, who claims to be an attorney for the estate of John Sullivan, deceased. The allowance was made direct to the attorney upon his application, without notice to any one interested in the estate, except, possibly, an oral notice to the administrator to the effect that the attorney intended to ask the court that he be paid something on account for his services. The administrator filed a motion to vacate this order, because made without notice to any one. Notice of this motion was given to all persons claiming to be heirs and interested in the estate. Appellants appeared on behalf of said motion. On March 4, 1904, the motion came on to be heard and on the following day was denied, and on March 12 the court entered another order re-allowing the said attorney McCafferty \$1,500, and directing its payment immediately. Appellants O'Callaghan and Corcoran claim to be the only heirs of John Sullivan, deceased, being first cousins, and S. H. Piles claims a one-half interest in the estate by deed from the said heirs. Respondents move to dismiss the appeal, because the order appealed from is not a final order, and because the appellants above named are not parties aggrieved, and are not persons interested in the estate.

All the questions presented on this appeal, both on the motion and on the merits, were decided by us in *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945, which was heard on writ of review from an order identical with this, and made subsequently. For the reasons therein stated, the order appealed from is reversed, and the lower court is directed to vacate and set aside the order allowing the attorney's fees.

¹Reported in 79 Pac. 1129.

Mar. 1905.]

Opinion Per Cudlam.

[No. 5222. Decided March 27, 1905.]

SIVERD BUSKALA, *Respondent*, v. E. F. CARVER, *Appellant*.¹

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered January 29, 1904, upon findings in favor of the plaintiff. Affirmed.

W. W. Black and Ralph C. Bell, for appellant.

J. M. Ralston, for respondent.

PER CUDLAM.—Action for \$44.25, and for the foreclosure of a lien on saw logs to secure that amount. Judgment rendered according to the prayer of the complaint.

This case presents a question purely of fact, on conflicting testimony, the only legal proposition discussed in the brief having been specifically waived at the trial of the cause. From an investigation of the record, we are not inclined to disturb the findings of the trial court. The judgment is therefore affirmed.

¹Reported in 80 Pac. 1134.

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- Order directing suit, vacation of, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1.
- Actions between parties in particular relations:* See LANDLORD AND TENANT, 1-5; MASTER AND SERVANT; PARENT AND CHILD, 1. Mortgagor and mortgagee, see CHATTEL MORTGAGES, 1-3; MORTGAGES, 1-15. Partners, see PARTNERSHIP, 1. Principal and agent, see BROKERS, 1. Stockholders and corporation, see CORPORATIONS, 3-5; VENDOR AND PURCHASER.
- Actions by or against particular classes of parties:* Assignees for creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1-3. Banks, see BANKS AND BANKING. See BROKERS; CARRIERS. Corporate officers, see CORPORATIONS, 3-5. Cotenants, see TENANCY IN COMMON. Counties, see COUNTIES, 2. See EXECUTORS AND ADMINISTRATORS, 1; GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 1-3. Against landlord, see LANDLORD AND TENANT, 6, 7. See MUNICIPAL CORPORATIONS; PARTNERSHIP, 1; RAILROADS; SEAMEN. Stockholders, see CORPORATIONS, 3-5. By taxpayer, see COUNTIES, 2.
- Actions relating to particular species of property or estates:* Community property, see HUSBAND AND WIFE, 1-3. Obstructions in stream, see WATERS AND WATER COURSES, 1-2. Joint estates, see TENANCY IN COMMON. Determination of rights to mining properties, see MINES AND MINERALS, 1.
- Particular causes or grounds of action:* See BILLS AND NOTES.

ACTION—CONTINUED.

1-4. Bonds, see INDEMNITY. Breach of contract, see CONTRACTS. Compensation of broker, see BROKERS, 1. Conversion of mortgaged goods, see CHATTEL MORTGAGES, 2. Diversion of water course, see WATERS AND WATER COURSES, 1-12. Enforcement of assessments for public improvements, see MUNICIPAL CORPORATIONS, 10, 12. For fraud, see BILLS AND NOTES, 3; FRAUD, 1; CORPORATIONS, 3-5; HUSBAND AND WIFE, 3; WATERS, 8. Injunction bond, see TENANCY IN COMMON 1. Injuries from flowage, see WATERS AND WATER COURSES, 13. See MALICIOUS PROSECUTION, 1; NEGLIGENCE, 1-3. Personal injuries, see CARRIERS, 1-3; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 3-5; NEGLIGENCE, 1; RAILROADS, 1-8; SEAMEN. Possession of mortgaged property, see CHATTEL MORTGAGES, 1-3. Recovery of demised premises, see LANDLORD AND TENANT, 1-5. Rent, see LANDLORD AND TENANT, 1, 2, 5. For taxes, see TAXATION, 1, 2.

Particular forms of action: See ATTACHMENT. Partition, see TENANCY IN COMMON, 2. In tort or on contract, see SEAMEN, 1. Unlawful detainer to recover demised premises, see LANDLORD AND TENANT, 1, 2.

Particular forms of special relief: See BAIL. Determination of mining rights, see MINES AND MINERALS, 1. Enforcement or foreclosure of lien, see MECHANICS' LIENS, 1-4, and LOGS AND LOGGING, 1, 2. Foreclosure of Mortgage, see CHATTEL MORTGAGES, 2; MORTGAGES, 3-8, 14, 15. Dissolution of partnership, see PARTNERSHIP, 1. Partnership accounting, see PARTNERSHIP, 1. See QUIETING TITLE. Redemption from mortgage, see MORTGAGES, 2, 7, 11, 12. Removal of cloud on title, see QUIETING TITLE, 1-3. Rescission of contract for sale of land, see VENDOR AND PURCHASER, 2, 4-7. Restraining diversion of stream, see WATERS AND WATER COURSES, 1-12. See SPECIFIC PERFORMANCE.

Particular proceedings in actions: See APPEARANCE; DAMAGES; EVIDENCE; EXECUTION; JUDGMENT; NEW TRIAL; LIMITATION OF ACTIONS; PARTIES; PLEADING; PROCESS; TRIAL.

Particular remedies in or incident to actions: See RECEIVERS. Stay of proceedings, see APPEAL AND ERROR, 19.

Proceedings in exercise of special jurisdiction: Suits in equity, see EQUITY. Habeas Corpus to admit to bail, see BAIL.

Review of proceedings: See APPEAL AND ERROR, 28-54; NEW TRIAL; JUDGMENT; TRIAL.

1. ACTIONS—JOINDER—APPEAL—HARMLESS ERROR IN JOINDER OF CAUSES. Error in the joinder of causes of action *ex contractu* and

ACTION—CONTINUED.

ex delicto is not prejudicial, where the verdict upon the cause of action improperly joined is in favor of the defendant, and said cause is dismissed. *Lavanway v. Cannon* 593

ADEQUATE REMEDY AT LAW:

Effect on jurisdiction of equity, see **EQUITY**, 1.

ADJOINING LANDOWNERS:

Right of way by prescription, see **HIGHWAYS**, 3-7

ADMINISTRATION:

See **EXECUTORS AND ADMINISTRATORS; WILLS.** m

Of estate of ward, see **GUARDIAN AND WARD**, 1.

Of estate assigned for benefit of creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 1-3.

ADMIRALTY:

See **SEAMEN**.

ADMISSIONS:

In answer, see **FRAUDS, STATUTE OF**, 2.

ADOPTION:

Bar of decree, see **JUDGMENT**, 2.

AFTER-ACQUIRED PROPERTY:

When conveyed by covenants in mortgage, see **DEEDS**, 1.

AGENCY:

See **PRINCIPAL AND AGENT**.

AGREEMENT:

See **CONTRACTS**.

ALIENATION:

Removal of restrictions, see **INDIANS**, 1.

AMENDMENT:

Of pleadings, see **APPEAL AND ERROR**, 10; **PLEADING**, 3-8.

Of pleadings to conform to proof, see **APPEAL AND ERROR**, 32.

To bring in new parties, see **MORTGAGES**, 6, 7; **PARTIES**, 2.

AMOUNT IN CONTROVERSY:

Jurisdictional amount, see **APPEAL AND ERROR**, 4-6

ANIMALS:

Vicious horses, see MUNICIPAL CORPORATIONS, 17a.

1. **ANIMALS—IMPOUNDING—MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.** Under Bal. Code, § 1011, a municipal corporation of the fourth class may prohibit the running at large of domestic animals, and an ordinance providing for the summary sale of impounded animals, under reasonable notice, without a judicial inquiry, is effective to transfer the title and does not authorize the taking of property without due process of law. *Shook v. Sexton* 509
2. **SAME—IMPOSING FINE.** A provision in such an ordinance imposing a fine against an owner for permitting animals to run at large, to be exacted without a judicial investigation, is unconstitutional. *Id.* 509
2. **SAME—INVALIDITY OF ORDINANCE AS TO FINE NOT AFFECTING BALANCE OF IMPOUNDING ORDINANCE—SALE—VALIDITY—OFFER TO PAY LEGAL CHARGES.** An invalid provision in an impounding ordinance whereby a fine is exacted from the owner, does not affect the validity of the other provision of the ordinance, otherwise complete in itself, prohibiting the running at large of domestic animals and providing for a summary sale, without judicial investigation, to pay said fine and the charges for the impounding keeping, and sale; nor does such provision affect the validity of a sale, where the owner did not offer to pay the legal charges, before or after the sale. *Id.*..... 509

APPEAL AND ERROR:**I. NATURE AND JURISDICTION.**

Jurisdiction of habeas corpus to admit to bail, see BAIL, 2.

II. DECISIONS REVIEWABLE.

Order granting new trial, see DAMAGES, 2.

Cessation of controversy, see MANDAMUS, 1.

1. **APPEAL—APPEALABLE ORDERS—AFFECTING SUBSTANTIAL RIGHTS AFTER JUDGMENT.** An order striking from a judgment so much thereof as awards judgment against a surety on a bond given by defendant to discharge an attachment, is appealable as a final order made after judgment which affected a substantial right. *Brady v. Onffroy* 482
2. **APPEAL—APPEALABLE ORDERS.** An order sustaining a demurrer is not appealable. *State ex rel. Small v. Fleming*..... 531
3. **APPEAL—APPEALABLE ORDERS—DISCHARGE IN HABEAS CORPUS.** Habeas corpus being a civil proceeding, an appeal lies from an order discharging the prisoner. *In re Garfinkle*.. 650

APPEAL AND ERROR—CONTINUED.

4. APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. The supreme court has jurisdiction of an appeal involving the validity of an ordinance, regardless of the amount in controversy. *Shook v. Sexton* 509
 5. APPEAL AND ERROR—JURISDICTION IN MANDAMUS IRRESPECTIVE OF AMOUNT IN CONTROVERSY OR VALIDITY OF STATUTE. Upon an appeal from an order made in a proceeding in the nature of mandamus, compelling a city attorney to approve a cost bill, the supreme court has jurisdiction irrespective of the amount in controversy, and although the validity of a statute is not involved. *Spokane v. Smith* 583
 6. APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. In actions of equitable cognizance, the supreme court has jurisdiction on appeal irrespective of the amount in controversy. *Trumbull v. Jefferson County* 604
 7. APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. Where, pending an appeal from an order refusing to enjoin a tax foreclosure sale, appellant pays the tax judgment, the appeal will be dismissed, since there is no longer any controversy, regardless of the fact that plaintiff was refused a supersedeas on appeal and was compelled to redeem in order to save the property. *Id.*..... 604
 8. SAME—LITIGATION OF COSTS BY SURETIES. The rule that the supreme court will not entertain an appeal to determine a matter of costs, does not apply to sureties upon a cost bond against whom judgment for costs has been rendered, appeal lying in their behalf from such judgment. *Id.*..... 604
- III. PRESERVATION OF GROUNDS.
9. APPEAL AND ERROR—EVIDENCE—SUFFICIENCY OF OBJECTIONS—WAIVER OF ERROR. Where an objection is improperly sustained and exceptions taken, but the same question is repeated in a different form, and answered, whereupon the court sustains the objection and cautions against further inquiry along that line, but the answer is allowed to stand and the defendant had the benefit thereof, there is no ruling of the trial court that can be reviewed on appeal (Fullerton J., dissenting). *State v. Patchen*. 24
 10. APPEAL AND ERROR—REVIEW—OBJECTIONS—SUBSTITUTION OF PARTIES WITHOUT AMENDING PLEADINGS. Error cannot be predicated on the failure to amend the pleadings at the time of making a substitution of parties, when no objection thereto was made in the court below. *Ellsworth v. Layton* 340

APPEAL AND ERROR—CONTINUED.

11. SAME—STRIKING STATEMENT—REVIEW OF ERROR IN EXCLUDING EVIDENCE. Failure to except to the findings of fact in an equity case, while a valid objection to the consideration of the facts, is not ground for striking the statement, where error is assigned on the action of the trial court in excluding evidence that might have changed the character of the findings. *Lilly v. Eklund*.... 532
12. APPEAL AND ERROR—EXCEPTIONS TO INSTRUCTIONS—WHEN TO BE TAKEN. Exceptions to instructions must be taken before the jury returns the verdict, and a stipulation that they might be taken at any time before the filing of a proposed statement of facts is unavailing to secure the review of exceptions taken long after judgment and without ever being called to the attention of the trial court. *Weber v. Snohomish Shingle Co.*..... 576
13. APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY. A general exception to all the findings of fact is insufficient unless it appears that each and all are erroneous. *Lilly v. Eklund*..... 532

IV. PARTIES.

Surety as party, see APPEAL AND ERROR, 18.

14. APPEAL AND ERROR—PARTIES—NOTICE—DENIAL OF VACATION OF JUDGMENT. Upon an appeal from an order denying a petition to vacate a judgment, the notice of appeal need be served only upon the parties who appeared in that proceeding to contest the petition. *Collins v. Kinnear*..... 453

V. REQUISITES FOR TRANSFER OF CAUSE.

Notice, upon whom to be served, see APPEAL AND ERROR, 14, 17, 18.

Exceptions, necessity for review, see APPEAL AND ERROR, 50-52.

Time for taking, see TAXATION, 3.

15. APPEAL AND ERROR—TIME FOR TAKING—EXTENDING BY PETITION FOR RECONSIDERATION. Where a motion to vacate a judgment is denied the time for taking an appeal from the order cannot be extended by the filing of a petition to reconsider the order of denial, and the taking of an appeal from an order refusing to grant the reconsideration. *Pedigo v. Fuller* 529
16. APPEAL—NOTICE—SUFFICIENCY. A notice of appeal from a judgment of the superior court, omitting the words, "to the supreme court" is sufficient since there is no other court to which the appeal could be taken. *Van De Vanter v. Flaherty* 218
17. APPEAL AND ERROR—NOTICE—TIME OF FILING—SERVICE ON UNNECESSARY PARTIES. The requirement of Bal. Code, §6503, that notice of appeal be filed within five days after service, is jurisdictional, and where the effective service upon all who were necessary parties was made in March, and the filing was not

APPEAL AND ERROR—CONTINUED.

- made until June, the appeal must be dismissed, and it is immaterial that a service of the notice was made upon nonessential parties in June within five days of the filing. *Collins v. Kinnear*. 453
18. APPEAL—ORAL NOTICE—SUFFICIENCY—SURETY ON BOND GIVEN TO DISCHARGE ATTACHMENT. Oral notice of appeal in open court from an order modifying a judgment is sufficient as to a surety on a bond given by the defendant to discharge an attachment, since the surety appears and is before the court, under Bal. Code, §§ 5374, 5375. *Brady v. Onffroy*..... 482
19. APPEAL AND ERROR—DISMISSAL—BONDS—AMOUNT OF SUPERSedeas BOND—MONEY JUDGMENT—INTERPLEADER. In an action of interpleader to recover a deposit in a bank, in which the money in controversy was deposited with the clerk of the court and judgment was entered ordering the clerk to pay it to the plaintiff, an appeal bond, conditioned also to effect a supersedeas, in a sum fixed by order of court, but less than double the amount of the judgment, is insufficient to give the supreme court jurisdiction of the appeal, and the appeal must be dismissed (Fullerton, J., dissenting). *Pierson v. Peirce*..... 443

VI. EFFECT AND STAY.

Right of infant to stay of commitment to reform school, see BAIL, 1.

20. APPEAL—DISMISSAL—EFFECT OF AFFIRMANCE—DISCHARGE OF ATTACHMENT. The dismissal of an appeal from an order discharging an attachment has the effect of an affirmance of the order, but gives the order no more vitality than it already had. *Brady v. Onffroy*..... 482

VII. RECORD.

Statement of facts, necessity of for review, see APPEAL AND ERROR, 52.

Statement of facts, filing, see APPEAL AND ERROR, 27.

Filing, see APPEAL AND ERROR, 27.

21. APPEAL AND ERROR—STATEMENT OF FACTS—REVIEW. A statement of facts is not necessary in an equity case triable *de novo* on appeal, where the only question for review is whether or not the findings support the conclusions of law and the decree. *Seattle v. Smithers*..... 119
22. APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—CERTIFICATE—OBJECTIONS TO EVIDENCE IN CASE TRIABLE DE NOVO. As a statement of facts in an equity case must bring up all the evidence in order to review the same *de novo*, a statement is insufficient where it appears from the certificate that it does not contain the

APPEAL AND ERROR—CONTINUED.

objections to questions propounded to witnesses upon the taking of depositions, nor the rulings of the trial court thereon, since it does not appear upon what competent evidence the case was submitted. *Caughey v. Rien* 296

VIII. BRIEFS.

Costs of, see APPEAL AND ERROR, 56.

23. APPEAL AND ERROR—BRIEFS—STRIKING OUT. A brief referring to the trial judge in grossly discourteous language will be struck out on motion, with leave to file a proper brief within thirty days. *Coats v. Seattle Elec. Co.*..... 8
24. APPEAL AND ERROR—BRIEFS. A motion to strike a brief on the ground of an incorrect statement of the case and want of references to the record will be denied where the record is short and reference thereto not essential to the decision. *State v. Brown*.. 97
25. APPEAL AND ERROR—BRIEFS—OBJECTIONS, WHEN TO BE RAISED—WAIVER. A point first suggested in the reply brief, and not discussed, will not be considered on appeal. *Stein v. Waddell*.... 634
26. SAME. In an action to declare a forfeiture of a contract of sale for defaults in payment, a default as to interest not claimed in the complaint and first advanced in the briefs, will not be considered on appeal. *Id.*..... 634

IX. MOTIONS AND DISMISSALS.

Cessation of controversy, see APPEAL AND ERROR, 7; MANDAMUS, 1.

Effect of dismissal on appeal from void order, see APPEAL AND ERROR, 20; ATTACHMENT, 3.

27. APPEAL—DISMISSAL—FILING OF STATEMENT AND BRIEFS. Motions to strike the statement and briefs and to dismiss the appeal for failure to file the same in time will be overruled where the statement was filed within time properly extended and the briefs were filed within 90 days after the appeal was taken. *State v. Pearson* 405

X. REVIEW.

Discretion of trial court, see TRIAL, 6-7.

Error cured by evidence, see TRIAL, 11, 12.

Error cured by instructions, see TRIAL, 2.

Harmless error in advisory verdict, see TRIAL, 10.

Harmless error in criminal actions, see CRIMINAL LAW, 6, 20-23.

Harmless error in joinder of actions, see ACTIONS, 1.

APPEAL AND ERROR—CONTINUED.

- Harmless error, judgment of foreclosure in excess of sum secured, see JUDGMENTS, 8.
- Findings not disturbed on conflicting evidence, see CARRIERS, 9; MINES AND MINING, 1.
- Matters reviewable, see APPEAL AND ERROR, 21, 22.
- Objections when to be raised, see APPEAL AND ERROR, 25, 26.
- Review of taxation of costs, see COSTS, 1.
- Review of rulings on new trial, see NEW TRIAL, 1-3.
- Severity of sentence not subject to review, see CRIMINAL LAW, 24.
- Waiver of demurrer, see PLEADINGS, 9-11.
- Waiver of error in refusing to vacate default, see APPEARANCE, 1.
28. APPEAL AND ERROR—REVIEW—EVIDENCE. It is harmless error to receive secondary evidence as to records, where the records were afterwards introduced in evidence. *Cummings v. Weir*.... 42
29. APPEAL AND ERROR—REVIEW—IMPROPER EVIDENCE ON TRIAL DE NOVO. Where the cause is tried *de novo* on appeal, improper evidence is not ground for reversal, since it will be disregarded. *Law v. Seeley* 166
30. APPEAL AND ERROR—REVIEW—EVIDENCE ON TRIAL DE NOVO. Error cannot be predicated on the improper admission of evidence in a case tried on the evidence in the supreme court, since it will be disregarded. *Van Behren v. Rettkowski*..... 247
31. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in a case tried *de novo* on appeal is harmless, as such evidence will be disregarded. *Gilmer v. Holland Investment Co.*..... 589
32. APPEAL AND ERROR—REVIEW—PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. In an equity case, tried *de novo* in the supreme court, an insufficient pleading will be considered amended to conform to the proof. *Ellsworth v. Layton*..... 340
33. APPEAL—EVIDENCE—HARMLESS ERROR. It is not prejudicial error to exclude evidence in rebuttal, where the fact offered in evidence is admitted by counsel in open court. *Lilly v. Eklund* 532
34. SAME. Where the findings in an equity case are not excepted to, error cannot be predicated on the exclusion of evidence that would not have made any material change in the findings of the court. *Id.*..... 532
35. APPEAL AND ERROR—PLEADING—WAIVING ERROR BY PLEADING OVER. Error in striking out a portion of the complaint is waived by the filing of an amended complaint. *Curtis v. Tenino Stone Quarries* 355

APPEAL AND ERROR—CONTINUED.

36. APPEAL—NONSUIT—WAIVER OF ERROR BY PROCEEDING WITH EQUITY TRIAL. In an equity case, the defendant, by proceeding with the trial, waives error in the overruling of a motion for a nonsuit or dismissal at the close of plaintiff's case. *Lilly v. Eklund* 532
37. APPEAL AND ERROR—REVIEW—INSTRUCTIONS. It is not error to refuse specific instructions that are covered in the general charge. *Go Fun v. Fidalgo Island Can. Co.*..... 238
38. APPEAL—REVIEW—HARMLESS ERROR. Error in instructions upon an issue found in favor of appellants is immaterial. *Lavanway v. Cannon*..... 593
39. APPEAL—HARMLESS ERROR—ERROR IN ADMISSION OF EVIDENCE CURED BY INSTRUCTIONS. The erroneous admission of evidence is cured by expressly withdrawing from the consideration of the jury the issue upon which it was offered. *Yakima Valley Bank v. McAllister* 566
40. APPEAL—PREJUDICIAL ERROR—ARGUMENT OF COUNSEL. A reversal is not justified by heated expressions of counsel in the argument. *Id.* 566
41. APPEAL AND ERROR—REVIEW. Where a case is tried in the court below solely on the theory of the unconstitutionality of a statute, the party will not be heard in the supreme court on the theory that the case came within certain exceptions to the statute. *Normile v. Thompson*..... 465
42. APPEAL AND ERROR—REVIEW—STIPULATION—EFFECT. A stipulation admitting the facts stated in the pleadings, and treated by the parties and court as sufficient to raise the validity of an ordinance, will be so considered on appeal. *Shook v. Sexton*.. 509
43. SAME—TRIAL—SETTING ASIDE VERDICT NOT SUSTAINED BY EVIDENCE—CONTRIBUTORY NEGLIGENCE. The verdict of a jury upon an issue as to contributory negligence which is contrary to what all reasonable men ought to find upon the undisputed testimony is not conclusive upon the court, and will be set aside upon appeal. *Woolf v. Washington R. & Nav. Co.* 491
44. APPEAL AND ERROR—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE. Where the finding is supported by substantial evidence, the preponderance of the testimony is for the jury, and the verdict will not be disturbed on appeal. *Hayes v. Ray*..... 58
45. APPEAL AND ERROR—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence is controlling and will not be disturbed on appeal. *Go Fun v. Fidalgo Island Can. Co.*..... 238

APPEAL AND ERROR—CONTINUED.

46. APPEAL AND ERROR—REVIEW—VERDICT ON CONFLICTING EVIDENCE. Where an issue as to the terms of a contract virtually becomes one of veracity between witnesses, and upon which reasonable men might differ, the conflict in the evidence being substantial, the verdict of a jury will not be disturbed on appeal. *Weber v. Snohomish Shingle Co.*..... 576
47. SAME—REVIEW OF FINDINGS—CONFLICTING EVIDENCE. The findings of the trial court will not be disturbed when justified by the whole evidence, and there is an irreconcilable conflict in the testimony. *Law v. Seeley*..... 166
48. APPEAL AND ERROR—REVIEW—EVIDENCE. Findings will not be disturbed when justified by the evidence, although the same is conflicting. *Van Behren v. Rettkowski*..... 247
49. APPEAL AND ERROR—REVIEW. Findings upon conflicting evidence will not be disturbed when the evidence does not preponderate against the same. *Minder v. Mottaz*..... 474
50. APPEAL AND ERROR—REVIEW—FINDINGS—EXCEPTIONS. Findings, not excepted to, will not be reviewed on appeal, although exceptions were taken to respondents' proposed findings, which were materially altered by the court. *Shaw v. Benesh*..... 457
51. APPEAL AND ERROR—EXCEPTIONS—REVIEW OF FINDINGS. Where no exceptions are taken to findings, the only question before the appellate court is the sufficiency of the findings to support the order. *In re Clifford*..... 460
52. APPEAL—REVIEW—STATEMENT OF FACTS IN HABEAS CORPUS—EXCEPTIONS. Upon an appeal from an order of discharge on a writ of habeas corpus, where the evidence was not brought up by a statement of facts and no exceptions were taken to the findings, the only question for review is whether the findings support the judgment. *Poor v. Cudihee*..... 609
53. APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIONS. In actions triable *de novo* on appeal, the findings of the trial court are not conclusive like the verdict of a jury, and while more or less advisory and controlling when based on evidence nearly equal, the supreme court will look at the testimony to see if the findings are justified. *In re Garfinkle*..... 650
54. APPEAL AND ERROR—TIDE LAND CONTEST—QUESTION AS TO FILES OF LAND COMMISSIONER'S OFFICE—REVIEW. Under the statute directing a trial *de novo* of questions involving the right to purchase tide lands, upon appeal from the board of state land commissioners, the superior court cannot, on such an appeal, review a decision of the board as to what are the proper records in the

APPEAL AND ERROR—CONTINUED.

case, made in a proceeding instituted by one of the parties pending the appeal, whereby the board refused to correct the record. *Squire v. Sidney* 1

XI. DETERMINATION AND DISPOSITION OF CAUSE.

Allowance of attorney's fees, see MECHANICS' LIENS, 3.

55. APPEAL AND ERROR—DECISION—THEORY OF TRIAL—REMAND—PLEADINGS—AMENDMENT AFTER REVERSAL. In an action to have a deed to defendants and a bond for a deed to plaintiff, declared a mortgage, in which action the rights of the plaintiff were tried upon the mortgage theory, the supreme court is unable to determine the plaintiff's rights under his bond for a deed, and, in reversing the case, will remand with directions to have such rights determined under amended pleadings without the commencement of another action. *Conner v. Clapp*..... 299
56. APPEAL AND ERROR—DECISION—COSTS. Where an appeal is affirmed as to part, and reversed as to part, of the appellants, and only one brief was filed, the respondents will be allowed one-half of their costs, and the successful appellants one-half of their costs. *Trumbull v. Jefferson County*..... 604

APPEARANCE:

Special, to vacate judgment, see JUDGMENTS, 9:

1. APPEARANCE—SPECIAL—WHEN WAIVED BY SUBSEQUENT GENERAL APPEARANCE. Under Bal. Code, § 4886, providing that every application for an order is a general appearance unless stated to be special, a special appearance to set aside a default on the ground that no service had been had, although renewed at the time of filing answer, is waived where the party subsequently appeared generally to file a petition to remove the cause to the United States Court, and entered into a stipulation with reference to the matter without stating that it appeared specially, and after judgment moved for a new trial without limiting the character of the appearance; and error in refusing to set aside the service is thereby waived. *Larsen v. Allan Line Steamship Co.*..... 555

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT, 1, 3-6.

APPLICATION:

For insurance, see INSURANCE, 1-3.

APPOINTMENT:

Of guardian, see GUARDIAN AND WARD, 2-4.

Of road supervisors, see STATUTES, 1.

ARCHITECTS:

Approval of work under contract, see CONTRACTS, 7, 8.

ARGUMENT OF COUNSEL:

See APPEAL AND ERROR, 40.

In criminal prosecutions, see CRIMINAL LAW, 15-18.

ARREST:

See BAIL.

ASSIGNMENTS:

See BILLS AND NOTES, 4.

Fraud as to creditors, see FRAUDULENT CONVEYANCES.

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

See BANKRUPTCY.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—ACCOUNTING BY ASSIGNEE—ACTION FOR—DEFENSES—CROSS-COMPLAINT—ORDER DIRECTING SUIT AGAINST ASSIGNEE—VACATION.** In an action against an assignee for the benefit of creditors to compel him to account to his successor for the funds of the estate, affirmative matter in the answer, in the nature of a cross-complaint, seeking the vacation of the order of the court upon which the suit is founded, is properly struck out on motion, since the order directing the suit to be brought is not final or binding upon the defendant, and is not a bar to any defense he may have to the action. *Rochford v. Doty* 232
2. **SAME—DEFENSES—PLEADING—PRIOR ATTACHMENT—ASSIGNEE COMPELLED TO PAY FOR PROPERTY TAKEN ON CLAIM AND DELIVERY BOND.** It is a good defense *pro tanto* to an action against an assignee for the benefit of creditors and his bondsman, to compel him to account to his successor for the funds of the estate, that a certain part of the insolvent's estate had been attached prior to the deed of assignment, the lien thereafter adjudged valid, and the defendant ordered to pay the attaching creditor the value of the property, which defendant, in an endeavor to protect the estate, had taken from the sheriff upon a claim and delivery bond; and it is error to sustain a demurrer thereto. *Id.* 232
3. **SAME—DEFENSES—PLEA OF DISCHARGE—COLLATERAL ATTACK.** A plea of a final discharge, upon due notice and the allowance of his final account, is a complete defense to an action against an

ASSIGNMENTS FOR BENEFIT OF CREDITORS—CONTINUED.

assignee for the benefit of creditors to compel him to account to his successor for the funds of the estate, since it is a bar to further proceedings that cannot be collaterally attacked; and it is error to sustain a demurrer thereto. *Id.*..... 232

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 1, 4, 7.

ATTACHMENT:

Plaintiff in, not bona fide purchaser, see EXECUTIONS, 3.

Prior to assignment, priority, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 2.

1. ATTACHMENT—DISCHARGE—RES ADJUDICATA—REJECTION OF SECURITY—SUBSEQUENT MOTION ON GROUND OF IRREGULARITY. An order, made on an order to show cause, refusing to vacate an attachment upon the defendant's offer to deposit in court certain stock as security, is not *res adjudicata* or the law of the case upon a subsequent application to discharge the attachment on the ground that the defendant was a resident of this state, nonresidence being the ground upon which the attachment was issued. *Brady v. Onffroy* 482
2. ATTACHMENT—DISCHARGE BY BOND—SUBSEQUENT ORDER PURPORTING TO DISCHARGE WRIT FOR IRREGULARITY. An attachment is discharged by the giving of a bond under Bal. Code, §§ 5374, 5375, and thereafter an order purporting to discharge the attachment has nothing upon which it can act and is a nullity for want of subject-matter. *Id.* 482
3. SAME—RELEASE OF SURETY FOLLOWING AS CONSEQUENCE OF VOID ORDER—RES ADJUDICATA—DISMISSAL OF APPEAL. Where an attachment has been discharged by the giving of a bond under Bal. Code, §§ 5374, 5375, and subsequently an order is entered purporting to discharge the attachment for irregularity, which order is a nullity, the granting of a motion to discharge the surety solely as a consequence to follow from the discharge of the attachment for irregularity, is not *res adjudicata* as to the liability of the surety on the bond regardless of the irregularity of the attachment, and does not become so by the dismissal of an appeal therefrom; since the court did not determine the liability of the surety upon any theory other than the irregularity of the writ. *Id.*..... 482
4. ATTACHMENT—DISCHARGE OF BOND—PROMISE TO PERFORM JUDGMENT—ESTOPPEL TO QUESTION REGULARITY OF WRIT. A bond to discharge an attachment, conditioned to perform the judgment,

ATTACHMENT—CONTINUED.

as required by Bal. Code, §§ 5374, 5375, is an unconditional promise to pay whatever judgment shall be rendered against the defendant, and estops the defendant and surety from thereafter raising any question as to the regularity of the attachment. *Id.* 482

5. **SAME—DISCHARGE FOR IRREGULARITY—WHEN QUESTION TO BE RAISED—RELEASE OF PROPERTY—STATUTES—CONSTITUTION.** Bal. Code, § 5376, providing that an application to discharge a writ of attachment may be made at any time before or after the "release" of the property, must be construed to refer to a release otherwise than by a previous discharge of the writ by the filing of a bond therefor, under § 5374, whereby the existence of the writ is ended; since after the discharge by bond there can be no discharge for irregularity. *Id.* 482

ATTORNEY AND CLIENT:

Fees, allowance in supreme court, see **MECHANICS' LIENS**, 3.
Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 15-18.

AUTHORITY:

Of agent, see **PRINCIPAL AND AGENT**, 1.
Of corporate officers or agents, see **CORPORATIONS**, 1, 2.
Of bank officers, see **BANKS AND BANKING**, 1.

BAIL:

1. **BAIL—INFANT COMMITTED TO REFORM SCHOOL—APPEAL AND STAY OF EXECUTION.** An infant convicted of crime and committed to the reform school has a right to be admitted to bail, pending an appeal to the supreme court. *Packenhams v. Reed.* 258
2. **HABEAS CORPUS—TO ADMIT TO BAIL—JURISDICTION OF SUPREME COURT.** The supreme court has jurisdiction of a writ of habeas corpus to admit to bail a prisoner who has appealed to the supreme court, and may make an order admitting the applicant to bail; and the fact that the superior court had denied bail and could be compelled by mandate to admit to bail, is no bar to the remedy by habeas corpus. *Id.* 258

BANKRUPTCY:

1. **BANKRUPTCY—JUDGMENTS—DISCHARGE—DEBTS NOT SCHEDULED—ACTUAL NOTICE OF CREDITOR.** A discharge in bankruptcy is a good defense to an action upon promissory notes, although the notes were not scheduled in the list of obligations, where the creditor had actual notice of the proceedings in time to have presented its claim, and failed to do so. *Delta County Bank v. McGranahan.* 307

BANKRUPTCY—CONTINUED.

2. **SAME—COLLATERAL ATTACK—MONEY MISAPPROPRIATED.** The order of discharge in bankruptcy is conclusive on collateral attack as to all provable debts not specially excepted, including notes given for money misappropriated while acting in a fiduciary capacity. *Id.*..... 307

BANKS AND BANKING:

1. **BANKS—POWER TO SELL NOTE—AUTHORITY OF CASHIER—EVIDENCE—GROUND OF OBJECTION—MATERIALITY.** It is not prejudicial error to sustain an objection to oral evidence of the authority of a bank cashier to sell a note of the bank, as not being the best evidence, as it is immaterial in any event, the bank having authority to sell a negotiable note regardless of such authority. *Carson v. Old Nat. Bank*..... 279

BAR:

- Of action by former adjudication, see **JUDGMENT**, 1-3.
- Of action by limitation, see **LIMITATION OF ACTIONS**, 1, 2.

BEATING:

- Defending against, see **CRIMINAL LAW**, 7, 21, 22.

BENEFITS:

- Deduction of benefits from damages in condemnation proceedings, see **EMINENT DOMAIN**, 1.
- Acceptance of, as ground of ratification, see **PRINCIPAL AND AGENT**, 1.

BIDS:

- Advertising for, necessity, see **MUNICIPAL CORPORATIONS**, 2.

BILL OF EXCHANGE:

- Acceptance in writing, see **BILLS AND NOTES**, 1.

BILL OF EXCEPTIONS:

- As part of record on appeal, see **APPEAL AND ERROR**, 21, 22.

BILL OF SALE:

- See **SALES**.

BILLS AND NOTES:

- Action on, barred by discharge, see **BANKRUPTCY**, 1.
- Authority to sell note, see **BANKS AND BANKING**, 1.
- Computation of period of limitations, see **LIMITATION OF ACTIONS**, 1.

BILLS AND NOTES—CONTINUED.

Coupon notes assigned before discharge of mortgage, see *ESTOPPEL*, 4.

Interest, see *MORTGAGES*.

Joint maker, deceased, see *PARTIES*, 1.

Joint note, community debt, see *HUSBAND AND WIFE*, 1, 2.

Jurisdiction to enjoin collection, see *EQUITY*, 1.

Note by married woman to avoid criminal prosecution of husband, defense of duress, see *HUSBAND AND WIFE*, 3.

Securing indorsement by trick, evidence of similar acts, see *FRAUD*, 1.

1. **BILLS AND NOTES—ORDERS—ACCEPTANCE IN WRITING—COMPLAINT—SUFFICIENCY.** A complaint in an action upon an order or bill of exchange is insufficient, and a demurrer thereto is properly sustained for want of sufficient facts, where it fails to allege that the acceptance of the order by defendant was in writing, under Laws 1899, p. 363, § 127, providing that there shall be no liability until the drawee has accepted the bill, and (§ 132) that such acceptance must be in writing. *Wadhams v. Portland etc. R. Co.*..... 86
2. **BILLS AND NOTES—DEFENSES—EVIDENCE—ORDER OF PROOF—GENUINENESS OF SIGNATURES—EVIDENCE OFFERED IN REBUTTAL.** In an action upon a promissory note where defendant's signature is denied, it is not error to exclude expert evidence offered only in rebuttal as to the genuineness of the signature, since the burden of proof was upon the plaintiff to establish that as part of its case in chief. *Yakima Valley Bank v. McAllister*..... 566
3. **BILLS AND NOTES—INDORSEMENT — DEFENSES — SIGNATURE OBTAINED BY TRICK—INTENT OF PARTIES.** The maker of a promissory note payable to himself is not liable thereon to a bona fide purchaser for value, where the note was made as the first step in a conditional payment for insurance, under the representation that it could not be negotiated until indorsed upon accepting the policy, and his indorsement was fraudulently secured by a trick whereby his signature to a contract penetrated through the paper on to the back of the note, without his knowledge; since it is not the physical act, but the intention of the parties that constitutes the contract of indorsement, and since the maker was not guilty of any negligent act for which he was responsible to innocent parties. *Id.*..... 566
4. **BILLS AND NOTES—MORTGAGES—ASSIGNMENT OF COUPONS—PAYMENT—ESTOPPEL.** Where a loan and trust company, having sold a mortgage and coupon notes to an eastern customer, was in the habit of advancing payment of the coupons six days before maturity, and the holder returned the coupons endorsed with the

BILLS AND NOTES—CONTINUED.

stamp of negotiability, the transaction does not amount to a voluntary payment of the coupons, and the trust company is not estopped to collect the same from the makers or from one who had assumed the mortgage. *Washington Loan & Trust Co. v. Ritz* 642

BONA FIDE PURCHASER:

- Attaching creditor at his own sale, see **EXECUTIONS**, 3.
- Notice of adverse use, see **HIGHWAYS**, 5.
- Of assets, see **CORPORATIONS**, 5.
- Of bill of exchange or promissory note, see **BILLS AND NOTES**, 3, 4.
- Of note, through agent, see **USURY**, 2.

BONDS:

- See **BAILEY**; **COSTS**.
- Action on, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 2.
- Action on injunction bond, see **TENANCY IN COMMON**, 1.
- On appeal, see **APPEAL AND ERROR**, 19.
- Indemnity bonds, see **INDEMNITY**.
- Indemnity against mechanics lien, see **MECHANICS' LIENS**, 1.
- Sureties upon, as parties to appeal, see **APPEAL AND ERROR**, 8, 18.
- To discharge attachment, effect, see **ATTACHMENT**, 2-5.

BOOMS:

- See **LOGS AND LOGGING**, 1, 2.

BOUNDARIES:

- Of highway, certainty and width, see **HIGHWAYS**, 6, 7.

BREACH:

- Of contract, see **CARRIERS**, 6-9; **CONTRACTS**; **INDEMNITY**, 1-5; **VENDOR AND PURCHASER**, 2, 4-7.
- Of condition or warranty, see **INSURANCE**, 1-3.

BROKERS:

1. **BROKERS—ACTION FOR COMMISSIONS—PROCURING CAUSE—EVIDENCE—SUFFICIENCY—EMPLOYMENT OF TWO BROKERS.** A broker is entitled to his commissions, as being the efficient procuring cause of the sale, where the property was listed with him for sale, advertised by him, and shown to a customer who received her first knowledge thereof through him, and where he at once advised the owner of the facts, although the customer afterwards inspected the property with another broker to whom the owner sold the property, and who at once conveyed to the plaintiff's cus-

BROKERS—CONTINUED.

tomer for a nominal consideration; and there is in such case no employment of two brokers calling for a division of the commissions. *Elmendorf v. Golden*..... 664

BUILDING CONTRACTS:

See CONTRACTS. 6-8; INDEMNITY, 1-5.

BULK STOCK LAWS:

Sale of stock in bulk, see FRAUDULENT CONVEYANCES, 1.

BURDEN OF PROOF:

On issue as to signature, see BILLS AND NOTES, 2.

CANCELLATION OF INSTRUMENTS:

See QUIETING TITLE.

Of forged note, see EQUITY, 1.

Of note, proper parties, see PARTIES, 1.

Rescission of contracts, tender, see VENDOR AND PURCHASER, 2, 4-6.

CAPITAL:

Of corporations in general, dividing among stockholders, see CORPORATIONS, 3-5.

CARRIERS:

1. CARRIERS—MASTER AND SERVANT—EMPLOYEE WHEN NOT PASSENGER ON BOAT. Where a stevedore employed on board a steamer was injured in a collision with a drawbridge through his master's negligence, he is not a passenger while idle and *en route*, and is entitled only to the degree of care owed to servants, where he lived on board under continuous employment, although his principal work was done while in port. *Lambert v. La Conner Trad. & Transp. Co.*..... 113
2. CARRIERS—NEGLIGENCE—INJURY TO PASSENGERS ALIGHTING FROM CAR—DEGREE OF CARE AS TO PLATFORMS—INSTRUCTIONS. In an action for personal injuries sustained by a passenger in alighting from a street car, caused by an alleged defect in the company's platform at a depot, it is not reversible error to instruct that the defendant's duty as a common carrier required the highest degree of care consistent with the reasonable and practical operation of its business, in view of the method and means of conveyance employed, where other instructions were given to the effect that carriers were bound to keep landing places in a reasonably safe condition, the rule being that something higher than merely ordinary care is required as to such places. *Hart v. Seattle, Renton etc. R. Co.*..... 424

CARRIERS—CONTINUED.

3. CARRIERS—REMOVAL OF TRESPASSERS FROM TRAIN—FORCE NECESSARY—RESISTANCE. In removing trespassers from a train, the employees may use such force as appears reasonably necessary, and where forcible resistance is offered, the jury should not weigh with too much nicety the force resorted to. *Clark v. Great Northern R. Co.*..... 537
4. CARRIERS—PASSENGER ENTERING CAR BARN—IMPROPER PLACE TO TAKE CAR—NEGLIGENCE—FAULTY CONSTRUCTION OF BARN. A street railway company is not a common carrier as to cars housed in its car barn over night for the purpose of repairs and cleaning, although four to six people on an average entered the barn every morning between the hours of 5 and 6 A. M., for their own convenience, without invitation, for the purpose of waiting for and taking the first car to distant points; and hence is not liable to passengers for injuries resulting from the faulty construction of the barn, there being nothing in the place to mislead or induce one to believe that it was a proper place to take a car, and all the surroundings indicating the purpose for which the barn was constructed and used. *Kroeger v. Seattle Electric Co.*..... 544
5. SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER—ENDEAVOR TO ENTER CAR AT IMPROPER PLACE. Where a passenger enters a car barn at an unusual and dangerous place to enter a car, and, after the signal to start the car is given, undertakes to enter the front entrance of the car when it is only three or four feet from the barn door, in a passage way so narrow that he would inevitably be caught and crushed between the car and door unless he succeeded in making the entrance before it reached the door, and where he had better opportunity than any one else of observing the dangers, he is, as a matter of law, guilty of contributory negligence which was the proximate cause of his injury, and it is error to fail to so instruct the jury. *Id.*..... 544
6. CARRIERS—INJURY TO HEALTH OF PASSENGER—BREACH OF CONTRACT TO PROVIDE FOOD—COMPLAINT—SUFFICIENCY. In an action for injury to a passenger's health, a complaint against a steamship company alleging actionable neglect on the voyage and a breach of the contract of carriage in failing to provide sufficient food and lodging, whereby the plaintiff became sick and permanently deaf, alleges a cause of action. *Larsen v. Allan Line Steamship Co.*..... 555
7. SAME—CONTRACT OF CARRIAGE—STIPULATION TO FURNISH FOOD—UNAVOIDABLE DELAY—CONSTRUCTION OF CONTRACT. A contract of carriage providing that the steamship company shall furnish good and sufficient food and suitable lodging during the whole

CARRIERS—CONTINUED.

of the journey, including "any unavoidable delay," must be construed to cover a delay by reason of government detention in quarantine, especially where it appears that all the food provided while in such quarantine was furnished by the steamship company. *Id.* 555

8. **SAME—NON-LIABILITY FOR DELAY NOT EXCUSE FOR NEGLIGENCE.** A clause in a contract of carriage exempting the carrier from liability for delay from "restraints of princes, rulers and peoples" does not relieve the company from liability for neglect in failing to provide suitable food and lodging during any such delay. *Id.* 555

9. **SAME—EVIDENCE OF BREACH OF CONTRACT AND RESULTING INJURY TO HEALTH—SUFFICIENCY.** In an action for damages for the breach of a contract of carriage, in failing to provide sufficient food or lodging during a time that the vessel was detained in quarantine, whereby plaintiff became sick and permanently deaf, there is sufficient evidence to sustain a finding for the plaintiff, and that his injuries were traceable to the exposure, where it appears that during the first two days the supply of food was very limited, that during two nights plaintiff had no bedding, and but one blanket during a stay of eighteen days when the nights were cold, that in consequence he became sick, and remained so, and was compelled to continue his journey while in that condition, whereupon he became delirious, that at the end of the journey, 21 days after the exposure, plaintiff's malady was meningitis, expert testimony being to the effect that deafness often resulted therefrom, and that there was no definite period of incubation of the disease which would sustain the claim that the time therefor had been too long after the exposure; and findings thereon for the plaintiff will not be disturbed because of conflicting evidence. *Id.* 555

10. **CARRIERS—STREET RAILWAYS—NEGLIGENCE AS TO TRACKS—CONTRIBUTORY NEGLIGENCE OF PASSENGER IN CROSSING TRACK AT IMPROPER PLACE.** One who alights at a street car platform, and attempts in the dark to cross the tracks diagonally at a point where they were raised above the level of the ground, and where there was no dedicated or worked roadway, must be held to be guilty of contributory negligence in tripping on the street car rail, where she is familiar with the place and dangers, and there was another way by a planked crossing which she could, and sometimes did, use to cross the tracks to her home. *Kalberg v. Seattle Electric Co.* 612

CATTLE STEALING:

See **CRIMINAL LAW**, 8.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES—RECORDING—POSSESSION OF MORTGAGEE—PURPOSE OF TAKING POSSESSION—BAILMENTS—EVIDENCE—CONTEMPORANEOUS ORAL AGREEMENT—VARYING TERMS OF WRITING**
Where, at the time of making a chattel mortgage, the property m
was delivered to and stored by the mortgagee, the mortgagor
claiming a gratuitous bailment, oral evidence is admissible to
show a purpose to hold the goods as a mortgagee in possession
for further security, under a contemporaneous oral agreement not
to record the chattel mortgage, since the taking of possession
was an independent act, and such evidence did not contradict
the terms of the written contract. *Brockway v. Abbott*..... 263
2. **SAME—POSSESSION OF MORTGAGEE—CONVERSION—DELAY IN FORECLOSURE.** A mortgagee in possession for the purposes of security
is not guilty of a conversion by reason of delaying foreclosure
after condition broken, while the right of foreclosure exists, and
the mortgagor cannot recover the value of the property without
redeeming from the mortgage debt. *Id.*..... 263
3. **SAME—UNRECORDED CHATTEL MORTGAGE—CREDITORS—NOTICE.** The
mortgagee of chattels, coming into possession in good faith be-
fore other liens attach, holds against all the world, although the
mortgage is not recorded and creditors have no notice thereof.
Id..... 263

CHILD:

See GUARDIAN AND WARD; PARENT AND CHILD, 1, 2.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

See INDIANS.

Equal protection of laws and privileges, see CONSTITUTIONAL
LAW, 1-3, 6, 7.

CLAIMS:

Against city, presenting, see MUNICIPAL CORPORATIONS, 15.

Against estate of bankrupt, presenting, see BANKRUPTCY, 1.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 6, 7.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLATERAL AGREEMENT:

Parol evidence, see EVIDENCE, 2.

COLLATERAL ATTACK:

- On discharge of assignee, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 3.
- On discharge in bankruptcy, see **BANKRUPTCY**, 2.
- On judgment, see **JUDGMENT**, 1-3, 12.

COMITY:

- Foreign administration, conclusiveness, see **WILLS**, 1.

COMMON CARRIERS:

- See **CARRIERS**.

COMMUNITY PROPERTY:

- See **HUSBAND AND WIFE**, 1, 2.

COMPARATIVE NEGLIGENCE:

- See **NEGLIGENCE**, 4.

COMPROMISE AND SETTLEMENT:

- By payment of judgment, estoppel to set up sheriff's deed, see **ESTOPPEL**, 2.
- Of litigation by order of court, see **GUARDIAN AND WARD**, 1.

CONDEMNATION:

- Taking property for public use, see **EMINENT DOMAIN**, 1.

CONDITIONAL SALES:

- Distinguished from mortgages, see **MORTGAGES**, 13.

CONDITIONS:

- In insurance policies, see **INSURANCE**, 2, 3.

CONGRESS:

- Grant of right of way, see **HIGHWAYS**, 8, 9.

CONSIDERATION:

- Of contract, see **CONTRACTS**, 1.
- Admissibility of parol evidence to show, see **EVIDENCE**, 2.

CONSTITUTIONAL LAW:

- Impounding sale, when due process of law, see **ANIMALS**, 1-3.
- License of peddlers, see **MUNICIPAL CORPORATIONS**, 6-9.
- Subjects and titles of statutes, see **STATUTES**, 1.
- Uniformity, see **TAXATION**, 1.
- Vacation of street, legislative question, see **MUNICIPAL CORPORATIONS**, 13.

1. **CONSTITUTIONAL LAW—DENTISTS—LICENSE FOR OWNERSHIP OF DENTAL OFFICE.** That portion of **LAWS**, 1891, p. 314, requiring one

CONSTITUTIONAL LAW—CONTINUED.

- to submit to an examination and secure a license from the state dental board, in order to "own, run or manage" a dental office, as distinguished from the practice of dentistry, is unconstitutional. *State v. Brown*..... 97
2. SAME—POLICE POWER. Restricting the right to own, run, or manage a dental office is not a proper exercise of the police power, since technical knowledge or skill is not essential to the proper exercise of such right and is not required for the well being of the public, and the acts in question do not injuriously affect the health, good order, or safety of society. *Id.*..... 97
3. SAME—RIGHT OF PROPERTY AND LIBERTY. Restricting the right to own, run or manage a dental office is an unwarranted abridgment of the private right of property and of the citizen's liberty to engage in legitimate pursuits for a livelihood. *Id.*..... 97
4. CONSTITUTIONAL LAW—POLICE POWER—DENTISTRY. The provisions of Laws 1901, pp. 314-318, regulating the practice of dentistry, are a valid exercise of the police power. *Id.*..... 106
State v. Sexton 110
5. COUNTY OFFICERS—HIGHWAYS—ROAD SUPERVISORS—APPOINTMENT BY COUNTY COMMISSIONERS—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE AUTHORITY. Road supervisors, with duties defined by, and compensation and time of service fixed by, the county commissioners, who have the general supervision over roads, are mere employees or deputies of the commissioners, and not county officers, within Const., art. 11, § 5, requiring the legislature to provide for their election, and Laws 1903, p. 223, §§ 12, 13, authorizing the commissioners to appoint such supervisors, is not an unlawful delegation of legislative authority or in conflict with said provision of the constitution. *State ex rel. Griffith v. Newland*..... 428
6. SAME—CLASS LEGISLATION—SPECIAL PRIVILEGES. Laws 1903, p. 223, providing that the county commissioners may appoint the road supervisors from among the qualified electors of the state, is not unconstitutional as granting special privileges or immunities to any citizen or class of citizens in violation of Const., art. 1, § 12, since the law places upon the same terms all persons in the designated class. *Id.*..... 428
7. LABOR—PUBLIC WORKS—EIGHT-HOUR DAY—CONSTITUTIONAL LAW—RIGHT OF CONTRACT. An ordinance prescribing an eight-hour day, and forbidding the employment for longer hours of any laborer upon municipal construction work, making the same a part of all city contracts for such work, and providing a penalty for any violation thereof by any city contractor, is not uncon-

CONSTITUTIONAL LAW—CONTINUED.

stitutional as in conflict with the fourteenth amendment or any other federal or state constitutional provision, since the same relates only to public works, and the state has a right to do its work in any manner it sees fit, and no violation of private rights is involved. *Normile v. Thompson*..... 465

CONTEMPT:

1. CONTEMPT—TO ENFORCE CONTRACT RIGHTS—ORDER IN PROBATE FOR DELIVERY OF EXEMPT PROPERTY—WAREHOUSEMAN'S RECEIPT. Where in probate proceedings certain personal property, stored with a warehouseman by the deceased, was set aside as exempt to the widow, and an order was made for its delivery to her, pursuant to which the warehouseman accepted from her the storage charges and issued her a warehouse receipt, she not wishing to remove the goods at that time, a subsequent delivery cannot be enforced by contempt proceedings for disobeying the order in probate, since the transaction was a constructive delivery and an independent contract enforceable in a proper action, and in no way connected with the order. *Drasdo v. Beck*..... 362

CONTRACTS:

Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
 Constitutional guaranty of liberty to contract, see **CONSTITUTIONAL LAW, 1-3, 7**.

Specific performance, see **SPECIFIC PERFORMANCE**.

Contracts of particular classes of parties: See **CARRIERS, 7-9**;
CORPORATIONS, 1, 2; **COUNTIES, 2**; **EXECUTORS AND ADMINISTRATORS, 1**; **GUARDIAN AND WARD, 1**; **MUNICIPAL CORPORATIONS**;
PRINCIPAL AND AGENT, 1. Married women, see **HUSBAND AND WIFE, 1-3**.

Contracts relating to particular subjects:

As to custody of child, see **PARENT AND CHILD, 2**.

For booming, see **LOGS AND LOGGING, 1, 2**.

Building, delay, breach, see **INDEMNITY, 1-5**.

For unlawful expenditure of public money, see **COUNTIES, 2**.

See **WATERS AND WATER COURSES, 1-9**.

Particular Classes of contracts: See **BILLS AND NOTES**; **DEEDS**;
INDEMNITY; **INSURANCE**; **SALES**.

Leases, see **LANDLORD AND TENANT**.

Sales of realty, see **VENDOR AND PURCHASER, 4-7**.

1. **CONTRACTS—FURNISHING INFORMATION TO LOCATE CLAIMS—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to sustain a verdict finding liability upon a contract to pay for information

CONTRACTS—CONTINUED.

whereby the defendants secured timber and homestead locations, where it appears that they secured their first information from the plaintiffs, made locations in pursuance thereof, and agreed to pay a specified sum per claim therefor; and the contract was not affected by plaintiffs' failure to point out the boundaries as agreed upon, where defendants declined such services. *Cummings v. Weir* 42

2. CONTRACTS—EVIDENCE OF ENTIRE CONVERSATION—RELEVANCY. Upon an issue as to the execution of a verbal contract to pay for certain information relative to timber and homestead locations, where the defendants on the same day sought to obtain a reduction of the price, the plaintiff is entitled to detail all the conversation that then took place, as tending to show whether the contract had been made, and it is not error to refuse to strike evidence of a remark then made by plaintiff impugning defendants' honesty. *Id.*..... 42
3. CONTRACTS—BREACH—STIPULATED DAMAGES—EVIDENCE OF ACTUAL PROFITS—IMMATERIALITY. In an action upon a contract to pack fish for a canning company, wherein stipulated damages of forty cents a case are agreed upon for each case less than 3,300, upon the failure of plaintiff to pack that number each day, it is proper to exclude evidence of the actual profit on each case of fish packed, offered by the defendant for the purpose of showing that it did not refuse the use of the machinery during certain hours, since there was no issue as to such profits, and the evidence would tend to confuse the jury. *Go Fun v. Fidalgo Island Can. Co.* 238
4. CONTRACTS—CONSTRUCTION—SUNDAYS — WORK UPON—INSTRUCTIONS. In an action upon a contract to pack a certain number of cases of fish for a canning company on every day during the continuance of the contract, and for stipulated damages per case for any shortage in the required amount, it is proper to instruct the jury to the effect that the plaintiff could not be charged with any shortage occurring on Sunday, nor offset the fish packed on Sunday against shortages occurring on other days, since the contract did not require work on Sundays. *Id.*..... 238
5. CONTRACTS—BREACH—DAMAGES—EVIDENCE—FAILURE OF PROOF. In an action for damages for the breach of a contract whereby plaintiff was to deliver the timber upon a certain tract of land, there is a total failure of proof where the evidence was meager and uncertain, and insufficient to show the amount of timber left on the land, its value, or the cost of cutting it. *Weber v. Snohomish Shingle Co.*..... 576

CONTRACTS—CONTINUED.

6. CONTRACTS—BUILDING HULL OF VESSEL—SPECIFICATIONS PART OF CONTRACT. A contract to build the hull of a vessel in accordance with specifications attached, includes superstructure to be built on the main deck, masts, rigging and other equipment particularly enumerated as part of the hull in the specifications. *Heffernan v. U. S. Fidelity etc. Co.*..... 477
7. CONTRACTS—CERTIFICATE OF ARCHITECT. A clause in a building contract requiring a certificate from two architects showing the completion of the work, is waived where the architects were co-partners and the partnership was dissolved shortly after the contract was made, and the owners refused to allow one of the architects to have anything to do with the work, both parties having accepted certificates of the other architect and acquiesced in his sole control of the whole work. *Lavanway v. Cannon*.... 533
8. SAME—COMPLETION OF BUILDING—UNPAID CLAIMS OUTSTANDING—BALANCE OF PRICE WHEN DUE TO CONTRACTOR. Where a building contract provided that the architect should give his certificate that the building was completed in accordance with the terms of the contract, and that the owner thereupon agrees to pay the price upon a showing by the contractor that no outstanding bills were unpaid, and further provided that, if there were any outstanding claims after final payment, the amount should be refunded by the contractor, the certificate of the architect, given in good faith upon completion of the building, and such showing by the contractor, are all that is required to show that the balance on the contract was due, although an unpaid claim was outstanding. *Id.* 533
9. CONTRACTS—EMPLOYMENT—EVIDENCE—SUFFICIENCY—NONSUIT. In an action for services performed at the special instance and request of the defendant, there is sufficient evidence to put defendant upon his proof, and it is error to grant a nonsuit, where the undisputed evidence for the plaintiff tended to show that he was employed by one H as agent of the defendant to do the assessment work on mines in Alaska, owned by a corporation of which defendant was president and a stockholder, the defendant agreeing to advance the money therefor, that the appellant had worked for a considerable time under such employment, and there was evidence showing the value of the services, especially where the trial court did not question the credibility of the witnesses (*Root, J., dissenting*). *O'Connor v. Simpson* 625

CONTRIBUTORY NEGLIGENCE:

See NEGLIGENCE, 1.

Of passenger, see CARRIERS, 4, 5, 10.

Of person injured at railroad crossing, see RAILROADS, 6-8.

Of servant, see MASTER AND SERVANT, 7-9.

Of teamster in fire department, see MUNICIPAL CORPORATIONS, 17a, 18.

CONVERSION:

1. **CONVERSION—RETURN OF PROPERTY—INSTRUCTIONS.** In an action for the conversion of personal property, it is proper to refuse to instruct that a failure to return the goods to the place from which they were taken would authorize a verdict for the plaintiffs, since a return was tendered to the plaintiffs at another place and the goods stored in a warehouse in their name, which negatives a conversion. *Browder v. Phinney*..... 70

CONVEYANCES:

See CHATTEL MORTGAGES; DEEDS; MORTGAGES.

Contracts to convey, see VENDOR AND PURCHASER, 1-7.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

CORPORATIONS:

See RAILROADS; MUNICIPAL CORPORATIONS.

Agreement of officer to pay for labor, see CONTRACTS, 9.

Water companies, see WATERS AND WATER COURSES, 1-12.

1. **CORPORATIONS—CONTRACTS—TRUSTEES—AGENTS—RATIFICATION BY STOCKHOLDERS—STATUTES—CONSTRUCTION.** The statute providing that the powers of a corporation shall be exercised by its board of trustees is not exclusive, and a contract made by agents, which was within the powers of the corporation, may be ratified at a stockholders' meeting so as to become a binding obligation. *Kirwin v. Washington Match Co.* 285
2. **SAME—ACCEPTING BENEFITS OF CONTRACT—ESTOPPEL.** Where money is received and used for the benefit of a corporation by its executive officers, who were also trustees, the corporation ratifies the contract under which the money was paid, and is estopped to deny the authority of its agents to make the same. *Id.*..... 285
3. **CORPORATIONS—FRAUDULENT CONVEYANCES—SELLING OUT TO ANOTHER CORPORATION.** The assets of an insolvent corporation being a trust fund for the benefit of creditors, one corporation cannot dispose of all its stock, assets and business to another corporation, itself ceasing to do business, and neither corporation making provision for the payment of the debts of the selling corporation. *Tacoma Ledger Co. v. Western Home etc. Ass'n.*..... 467

CORPORATIONS—CONTINUED.

4. **SAME—DIVIDING CAPITAL STOCK AMONG STOCKHOLDERS—ASSETS SOLD TO ANOTHER CORPORATION.** An arrangement whereby all the property and business of a corporation is to be sold and turned over to another corporation in consideration of shares of the capital stock of the purchasing corporation, issued to and for the benefit of the stockholders in the selling corporation, which agreed to cease to do business, is in violation of Bal. Code, § 4265, making it unlawful for the trustees to divide, withdraw, or in any manner pay to stockholders any part of the capital stock of a corporation, and is fraudulent as to creditors. *Id.*..... 467
5. **SAME—BONA FIDA PURCHASER—NOTICE OF DEBTS.*** In such a case if the selling corporation was in failing circumstances at the time of the transfer, the fact that the purchaser was unaware of the indebtedness is immaterial. *Id.*..... 467

CORROBORATION:

Of accomplices, see CRIMINAL LAW, 8.

On prosecution for perjury, see CRIMINAL LAW, 10, 11.

COSTS:

Of defendant charged with violation of ordinance, see MUNICIPAL CORPORATIONS, 19-22.

Litigation of, see APPEAL AND ERROR, 8.

Sureties on cost bond, see APPEAL AND ERROR, 8, 18.

1. **COSTS—RETAXATION.** The costs allowed upon a retaxation before the trial court will not be disturbed on appeal, where the record shows a dispute as to the propriety of the item allowed, supported by an affidavit on each side. *Lambert v. La Conner Trad. & Transp. Co.* 113
2. **COSTS—SURETIES ON NONRESIDENT'S COST BOND—JUDGMENT AGAINST.** Upon entering judgment against a nonresident plaintiff, the court is without jurisdiction to enter judgment for costs against sureties upon the cost bond, and such a judgment is a nullity. *Trumbull v. Jefferson County* 604

CO-TENANCY:

See TENANCY IN COMMON.

COUNTIES:

A municipal corporation, see EMINENT DOMAIN, 1.

Commissioners' acceptance of grant of right of way, see HIGHWAYS, 8, 9.

Commissioners and road supervisors, duties, appointment, see CONSTITUTIONAL LAW, 5, 6; STATUTES, 1.

Power to keep tract indices, see RECORDS, 1, 2.

COUNTIES—CONTINUED.

1. **COUNTY COMMISSIONERS—VACANCY—HOW FILLED.** Upon a vacancy occurring in the office of a county commissioner, the two remaining members have power to select a successor, Bal. Code, § 327, providing that the judge of the superior court of the county shall act with them, being in conflict with Const. art. 11, § 6, which provides that the county commissioners shall fill vacancies in any county office. *State ex rel. Pendergast v. Fulton*..... 271
2. **COUNTIES—UNLAWFUL EXPENDITURE OF PUBLIC MONEY—INJURY TO TAXPAYER PRESUMED.** It cannot be objected to a suit by a taxpayer to enjoin the unlawful expenditure of public money that he is not damaged for the reason that money is thereby saved to the county, since injury is conclusively presumed from the unlawful expenditure of public money. *Dirks v. Collin*..... 620

COURTS:

- Approval of cost bill, see MUNICIPAL CORPORATIONS, 19-22.
- Contempt of court, see CONTEMPT.
- Jurisdiction of homicide on reservation, see INDIANS, 1.
- Mandamus to inferior courts, see MANDAMUS, 1.
- Review of assessment of tax, see TAXATION, 2.
- Review of decisions, see APPEAL AND ERROR, 28-54.

COVENANTS:

- Passing after-acquired title, see DEEDS, 1.

CREDITORS:

- See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; FRAUDULENT CONVEYANCES.
- Of insolvent corporation, assets a trust fund, see CORPORATIONS, 3.
- Rights as to chattel mortgage by debtor, see CHATTEL MORTGAGES, 1-3.

CRIMINAL LAW:

- See CONTEMPT. Bail, see BAIL, 1, 2. Jury, see JURY, 1. See WITNESSES.
- Extradition of persons accused, see EXTRADITION, 1.
- Jurisdiction of crimes on reservation, see INDIANS, 1.
- Violation of municipal ordinances, see MUNICIPAL CORPORATIONS, 7-9, 22.

I. INFORMATION AND DEFINITIONS.

1. **CRIMINAL LAW—PRACTICING DENTISTRY WITHOUT A LICENSE—INSTRUCTIONS.** Upon a prosecution for practicing dentistry without a license it is proper to instruct that it is not necessary to

CRIMINAL LAW—CONTINUED.

show that a fee was charged for any specific act, or payment made upon performance of the service, or that the act was committed on the exact day charged, but that it was sufficient if it appears that a fee was charged for a series of acts of which the act complained of was one, and that payment was made at any time within one year, for an act performed within one year of the filing of the information. *State v. Brown* 106

2. CRIMINAL LAW—PRACTICING DENTISTRY WITHOUT A LICENSE—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of the offense of practicing dentistry without a license where it appears that the defendant cleaned a patient's teeth, removed tartar therefrom, and made an examination for the purpose of estimating the cost of further treatment. *State v. Ser-ton* 110
3. PRACTICING DENTISTRY WITHOUT LICENSE—EVIDENCE OF QUALIFICATIONS—ATTACK ON DECISION OF DENTAL BOARD. Upon a prosecution for practicing dentistry without a license, it is proper to exclude evidence going to show that the defendant properly passed his examination and that the license was withheld through the fraud of the dental board, since the decision of the board cannot be questioned in that manner. *State v. Brown*..... 106

II EVIDENCE.

4. CRIMINAL LAW—RAPE—EVIDENCE. In a prosecution for rape upon a child, committed in the presence of other children called as witnesses for the state, it is not proper to restrict their cross-examination by the defendant, and that it tends to show the commission of another crime by defendant is no valid objection. *State v. Patchen* 24
5. CRIMINAL LAW—RAPE—UNSUPPORTED TESTIMONY OF CHILD. It is proper to instruct that one may be convicted of rape upon the unsupported evidence of an infant under the years of discretion. *Id.*.... 24
6. HOMICIDE—EVIDENCE IN REBUTTAL—RELEVANCY. Where the state in a prosecution for homicide gave evidence of threats made by the defendant against the deceased, and the defendant in justification made a detailed statement of his troubles with the deceased, rebuttal testimony giving the state's version of such troubles is admissible. *State v. Armstrong*..... 51
7. CRIMINAL LAW—IMPROPER QUESTIONS—OTHER ACTS—HARMLESS ERROR. In a prosecution for a homicide, permitting the state to ask if the witnesses had heard of the accused's engaging in other

CRIMINAL LAW—CONTINUED.

- acts of violence, is not prejudicial where the witnesses answered in the negative. *State v. Manderville* 365
8. CRIMINAL LAW—HOMICIDE—MURDER IN SECOND DEGREE—KILLING IN AFFRAY—EVIDENCE—SUFFICIENCY. In a prosecution for a homicide, where the deceased was stabbed by the accused in a saloon fight and the plea of self-defense is made, there is sufficient evidence to warrant a conviction of murder in the second degree, where it appears that there had been ill-feeling between the deceased and the accused, that there was talk of fight before the affray, that the accused was armed with a knife, and the deceased was unarmed and using only his fists, that they were about equal in physical ability, that the fight was of very short duration, and the deceased was severely cut in several places, that the accused admitted the cutting, and there was evidence that he had expressed the hope that it would result fatally; although there was conflict in the evidence as to how the fight started. *Id.*..... 365
9. CRIMINAL LAW—CATTLE STEALING—TESTIMONY OF ACCOMPLICE—CORROBORATION—CAUTION TO JURY—INSTRUCTIONS. In a prosecution for cattle stealing, where a convicted accomplice admitted to having testified in a former trial to statements contradicting his present testimony, and there was no corroborating evidence, it is reversible error to refuse to give an instruction cautioning the jury against convicting the accused upon the uncorroborated testimony of an accomplice, and stating that the jury could not so convict where the accomplice admitted to testifying differently on a former occasion. *State v. Pearson* 405
10. CRIMINAL LAW—EVIDENCE—IDENTIFICATION—EXPERT EVIDENCE—OPINION OF POLICE OFFICER FROM DESCRIPTION—PERJURY. In a prosecution for perjury in having testified to an alibi for one F, charged with a certain robbery, the testimony of a police officer that, upon receiving a description of the guilty parties, he started out "to hunt for F and E, for the men that did the job," is inadmissible and prejudicial error, since it amounted to an expression of his opinion, from a mere description, that F was guilty of the robbery, making the accused guilty of the perjury charged, and the matter is not a proper subject of expert evidence. *State v. Rutledge* 523
11. SAME—PERJURY—TWO WITNESSES—CORROBORATION — INSTRUCTIONS. It is not error to refuse to instruct that no conviction could be had for perjury unless the falsity of the evidence was proved by two witnesses, or by one witness and corroborating circumstances of equal weight and credibility as the testimony of another witness; since the rule is that the corroborating cir-

CRIMINAL LAW—CONTINUED.

cumstances established by independent evidence need not equal in weight the testimony of a second witness, but need only be of such a character as to turn the scale and overcome the evidence of the defendant and the legal presumption of his innocence. *Id* 523

12. SAME—FACT OF MORE THAN ONE WITNESS. A refusal to instruct that there can be conviction for perjury without the evidence of two witnesses, or one witness and corroborating circumstances, is not justified by the fact that there was more than one witness, since the jury is at liberty to disregard the evidence of any witness as unworthy of credence. *Id*..... 523

III. TRIAL—INSTRUCTIONS.

Costs, upon acquittal of defendant, see MUNICIPAL CORPORATIONS, 19-22.

13. CRIMINAL LAW—TRIAL—TIME FOR PLEA. The defendant cannot allege error in that he was not allowed one day to plead, where at the arraignment he answered that he was ready and plead not guilty. *State v. Brown* 106
14. CRIMINAL LAW—TRIAL—TIME FOR PLEA—WAIVER OF OBJECTION. The defendant cannot allege error in that he was not allowed one day in which to plead, where he waived arraignment and the trial was continued, and no objection was made until after conviction. *State v. Sexton* 110
15. CRIMINAL LAW—TRIAL—INDORSEMENT OF NAMES OF WITNESSES. It is largely discretionary to permit a witness to testify without indorsement of his name upon the information, and is not ground for reversal where defendant suffered no disadvantage thereby. *Id* 110
16. TRIAL—ARGUMENT OF COUNSEL—LIMITING. Error cannot be predicated in a criminal prosecution upon limiting the argument of counsel to twenty-five minutes, where counsel refused to use ten minutes additional, granted at the close of his argument. *State v. Patchen*, 24
17. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL—OPINION OF PROSECUTING ATTORNEY. A statement by the prosecuting attorney that the jury will agree with him that "this is the worst homicide that ever occurred in the county," is not objectionable argument because of drawing a comparison with other homicides; nor is it objectionable as an expression of the prosecutor's opinion, since he may state his opinion based upon or deduced from the evidence, when it is not given as independent fact. *State v. Armstrong* 51

CRIMINAL LAW—CONTINUED.

18. CRIMINAL LAW—TRIAL—IMPROPER ARGUMENT—COMMENT ON FAILURE TO TESTIFY. Remarks of the prosecuting attorney in argument asking why they have not explained certain incriminating circumstances, and stating that it was easy for them to do so, should be construed as addressed to the argument of opposite counsel and not a comment on the failure of the accused to testify, which is forbidden by implication by the statute. *State v. Smokalem* 91
19. SAME. The prosecuting attorney may comment on the failure to explain incriminating circumstances, although in part they might have been explained by the accused, when he does not comment on the failure of the accused to testify. *Id.* 91
20. CRIMINAL LAW—HOMICIDE—TRIAL—REQUEST FOR SPECIFIC INSTRUCTIONS—ERROR. Upon a prosecution for murder in the first degree, it is not error to fail to define deliberation and premeditation in the instructions to the jury, in the absence of a specific request therefor. *State v. Armstrong* 51
21. CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—DEFINITION OF BEATING—HARMLESS ERROR. In a prosecution for homicide, where the plea was self-defense in avoiding a beating administered by the deceased, an instruction defining a "beating" as a functional derangement such as the blackening of an eye, while subject to criticism, will not be ground for reversal, where it appears from the evidence and other instructions that the accused was not prejudiced thereby. *State v. Manderville.* 365
22. SAME—RIGHT TO DEFEND AGAINST BEATING. In a prosecution for a homicide, an instruction to the effect that the right of self-defense does not justify one in killing an assailant who makes an assault without a deadly weapon with intent to administer a mere beating, is not prejudicial, where, with five or six other instructions on the subject taken as a whole, the law is fairly presented. *Id.* 365
23. TRIAL—COMMENT ON FACTS—HARMLESS ERROR—HOMICIDE—SELF-DEFENSE—ADMITTED FACT. In a prosecution for a homicide, unlawful comment of the judge, at the time of the introduction of the evidence, in telling the jury that they must remember the evidence of a certain witness respecting the identification of a knife, is not prejudicial error, where the identification of the knife became immaterial and unimportant through the plea of self-defense, it being an admitted fact that the killing was done by the accused with a knife similar in appearance. *Id.* 365
24. SAME—INSTRUCTIONS. In a prosecution for a homicide an instruction in the nature of a comment on the evidence, in that it

CRIMINAL LAW—CONTINUED.

assumed that witnesses had testified to incriminating circumstances, is not reversible error where that is a conceded fact in the case, the killing being admitted under a plea of self-defense, and where the jury were instructed to disregard all comments on the evidence; since unlawful comment on the evidence is not ground for reversal where it affirmatively appears that it was without prejudice. *Id.*..... 365

25. **CRIMINAL LAW—EXCESSIVE SENTENCE—REVIEW.** The severity of a sentence is not the subject of review upon appeal. *State v. Patchen* 24

CUSTODY:

Of child, see **PARENT AND CHILD**, 2.

DAMAGES:

Breach of contract of carriage, see **CARRIERS**, 6-9.

For breach of contract to deliver timber, failure of proof, see **CONTRACTS**, 5.

Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 3.

Compensation for property taken for public use, see **EMINENT DOMAIN**, 1.

See **MALICIOUS PROSECUTION**, 1.

Not running with land, see **RAILROADS**, 10.

For obstructions of navigable waters, see **WATERS**, 13, 15.

Stipulated sum, see **CONTRACTS**, 3, 4.

Unlawful detainer of demised premises, see **LANDLORD AND TENANT**, 2.

Waiver of, see **INDEMNITY**, 3.

1. **DAMAGES—PERSONAL INJURIES — PHYSICAL EXAMINATION OF PLAINTIFF.** Where the plaintiff in an action for personal injuries was examined before the trial at the instance of the defendant, and a trial amendment was allowed showing further injuries, whereupon two physicians were appointed to make a further physical examination, only one of whom attended and testified, it is not an abuse of discretion to refuse to permit any further examination of the person of the plaintiff except such as could be had in the presence of the jury. *Helbig v. Grays Harbor Elec. Co.* 130
2. **EXCESSIVE DAMAGES—REMISSION OF EXCESS OR NEW TRIAL ABSOLUTELY—APPEALABLE ORDER.** In an action to recover unliquidated damages for a malicious prosecution, in which the jury return an excess verdict, the question whether the excess shall b

DAMAGES—CONTINUED.

remitted or a new trial granted absolutely, is addressed solely to the discretion of the trial judge, and no appeal lies from the exercise thereof. *Wait v. Robertson Mtg. Co.*..... 282

DAMS:

See WATERS AND WATER COURSES, 13.

DANGEROUS PREMISES:

See CARRIERS, 2, 4, 5; NEGLIGENCE, 2, 3.

Approach to demised premises, see LANDLORD AND TENANT, 6, 7.

Right of way, licensee, see RAILROADS, 4, 5.

DEATH:

Wrongful death caused by operation of railroad, see RAILROADS, 4-8.

DEBTOR AND CREDITOR:

See BANKRUPTCY; ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES.

DEEDS:

Absolute deed as mortgage, see MORTGAGES, 13.

Estoppel to set up sheriff's deed, after payment of judgment, see ESTOPPEL, 2.

Of trust, when fee passes, see MORTGAGES, 14.

Water rights, see WATERS AND WATER COURSES, 1-9.

1. **STATE DEEDS—MORTGAGES—COVENANTS—WARRANTY—AFTER-ACQUIRED TITLE—TIDE LANDS BELONGING TO STATE.** A mortgage covering tide lands belonging to the state, which contains a covenant of seizin and general warranty against all lawful claims, conveys the after-acquired title of the mortgagor, secured through a state deed issued after the decree and foreclosure sale, upon an application for purchase made pending the foreclosure. *Peoples Sav. Bank v. Lewis* 344

DELIVERY:

Of goods in warehouse, see CONTEMPT, 1.

DENTISTRY:

Collateral attack on decision of state dental board, see CRIMINAL LAW, 2.

Prosecution for practicing without a license, see CRIMINAL LAW, 1, 2.

Regulation and license, see CONSTITUTIONAL LAW, 1-4.

DESCENT AND DISTRIBUTION:

Decree by foreign court, see **WILLS**, 1.

DISCHARGE:

From indebtedness, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 3; **BANKRUPTCY**, 1, 2.

Of attachment, see **ATTACHMENT**, 3.

Of mortgage, see **ESTOPPEL**, 4.

DISMISSAL:

Waiver of nonsuit, see **TRIAL**, 11, 12.

DISSOLUTION:

Of attachment, see **ATTACHMENT**, 1.

Of partnership, see **PARTNERSHIP**, 1.

DIVERSION:

Of water course, see **WATERS AND WATER COURSES**, 1-12.

DUE PROCESS OF LAW:

See **ANIMALS**, 1-3; **CONSTITUTIONAL LAW**, 7.

DURESS:

Defense to note of wife, see **HUSBAND AND WIFE**, 3.

EASEMENTS:

By prescription, see **HIGHWAYS**, 3-7.

Water rights, see **WATERS AND WATER COURSES**, 1-12.

EJECTION:

Of trespassers, see **CARRIERS**, 3; **RAILROADS**, 1-3.

EJECTMENT:

Improvements, recovery for, see **STATUTES**, 2.

ELECTIONS:

Of road supervisors, see **CONSTITUTIONAL LAW**, 5, 6.

EMINENT DOMAIN:

Injunction pending proceedings for municipal water supply, see **WATERS**, 11, 12.

1. **EMINENT DOMAIN—APPROPRIATION BY COUNTY FOR HIGHWAY—DAMAGES—OFFSETTING BENEFITS—COUNTIES—MUNICIPAL CORPORATIONS.** In a proceeding to appropriate lands for a county road, benefits accruing to the defendant's land by the establishment of the highway may be offset against the damages for the land taken, since a county is a municipal corporation within the exception of Const., art. 1, § 16. *Lincoln County v. Brock*..... 14

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Re-entry by landlord, see LANDLORD AND TENANT, 5.

EQUITY:

See ESTOPPEL; QUIETING TITLE; SPECIFIC PERFORMANCE.

Accounting, see MORTGAGES, 7, 11, 12.

Actions to redeem, see MORTGAGES, 2, 7, 11, 12.

Jurisdiction, upon appointing guardian, see GUARDIAN AND WARD, 3.

1. EQUITY—BILLS AND NOTES—JURISDICTION TO CANCEL FORGED NOTES. Equity has jurisdiction of an action brought to cancel a joint note, alleged by the plaintiffs to be a forgery, although the same may be past due, especially where one of the plaintiffs is an invalid, since there is danger of losing the evidence upon which the action is based before any adequate remedy at law can be obtained; and Bal. Code, §§ 6034-6038, providing for the perpetuation of testimony does not furnish effective means for preserving the evidence, or any adequate relief against the annoyance of such an outstanding claim. *Ritterhoff v. Puget Sound Nat. Bank* 76

ESTATES:

Tenancy in common, see TENANCY IN COMMON.

Tax on, see WILLS.

ESTOPPEL.

Against holder of assigned coupons, see BILLS AND NOTES, 4.

To dispute contract by accepting benefits, see CORPORATIONS, 2.

By judgment, see JUDGMENT, 1-3.

Of land owner, acquiescence in construction of road, see RAILROADS, 9-12.

To question validity of writ, see ATTACHMENT, 4.

Of surety, by notice of suit, see INDEMNITY, 5.

1. ESTOPPEL—STREET RAILWAYS—RIGHT OF WAY—ACQUIESCENCE. Where the owner of platted land agrees in writing to give a right of way across the same for a street railway in consideration of the benefits to be derived therefrom, the railway to be completed in one year on a line acceptable to him, and thereafter acquiesced in the construction of the railway and its use for seven years, he is estopped from asserting that he did not agree to the exact location, or from in any way questioning the right to use the same. *Robertson Mtg. Co. v. Seattle etc. R. Co.* 137

ESTOPPEL—CONTINUED.

2. ESTOPPEL—SETTLEMENT AND COMPROMISE—JUDGMENT—PAYMENT IN IGNORANCE OF EXECUTION SALE. Where judgment debtors make a settlement of a judgment in ignorance of the fact that an execution had been issued and their land sold thereunder to the judgment creditors, no sheriff's deed having been issued or certificate of sale recorded, and the judgment creditors are aware of such ignorance and know that the debtors suppose that the sum paid was for an assignment of the entire judgment, the judgment creditors are estopped from asserting any rights under the sheriff's deed thereafter issued, or from denying that the settlement included the entire judgment. *Barto v. Davis*..... 186
3. ESTOPPEL—MECHANICS' LIENS—MATERIAL INTENDED TO BE USED CONSIDERED PART OF REALTY—CONTRACTOR BOUND BY PREVIOUS LITIGATION. The plaintiff, a contractor, is estopped from claiming that finishing material intended to be used in the construction of, and actually stored in an unfinished hotel building, is not part of the realty, where it appears that he purchased the material to be used in the construction of the hotel and brought an action to foreclose a mechanics' lien on the building and material, and recovered a judgment for the amount due him, which was declared a lien on the real estate, and the real estate was sold thereunder; and where he had in another suit enjoined the levy of execution upon the material, on the ground that the material was in good faith intended to be used in the building; and where in other litigation to which he was a party it was found that appellant's lien was subordinate to a mortgage lien upon the real estate; and where the material was afterwards actually used in the construction of the building, after being sold on execution issued upon a judgment recovered against him for the purchase price thereof; since it appeared that the court treated the material as part of the real estate in adjusting the rights of the parties, and the title thereto passed by the plaintiff's execution sale of the real estate *Potvin v. Denny Hotel Co.*..... 323
4. ESTOPPEL—IN FAVOR OF PURCHASER OF MORTGAGED PREMISES—BILLS AND NOTES—MORTGAGES—HOLDER OF UNPAID COUPONS—NOTICE OF NEGOTIATIONS. Where a purchaser of mortgaged property, who had assumed payment of the mortgage as part of the purchase price, paid the amount claimed by the holder, and received a satisfaction in full discharge of the mortgage, the holder of unpaid negotiable coupon notes secured by the mortgage, to whom they had been assigned by the holder of the mortgage before maturity, is not estopped to assert a claim against the property and to foreclose the mortgage to satisfy the same, by reason of the fact that four days before he purchased the property or

ESTOPPEL—CONTINUED.

assumed the mortgage, the purchaser wrote to the assignee of the coupons that he was about to arrange a release of the mortgage and if it had any interest to advise him, and that he received no reply; nor by the fact that the assignee had for a long time been the agent of the holder of the mortgage for the purpose of collecting interest, had notice of the pending negotiations, and gave no notice that it held the coupons or that they were unpaid. *Washington Loan & Trust Co. v. Ritz*..... 642

EVICITION:

Of tenant of demised premises, see **LANDLORD AND TENANT**, 5.

EVIDENCE:

See **WITNESSES**.

Harmless error in rulings on, see **APPEAL AND ERROR**, 23-34;
CRIMINAL LAW, 6, 22.

Incorporation in record on appeal, see **APPEAL AND ERROR**, 21, 22.
Instructions as to, see **TRIAL**, 2, 4, 8, 9; **CRIMINAL LAW**, 19-23.

Objections for purpose of review, see **APPEAL AND ERROR**, 9, 10,
22; **PLEADINGS**, 11.

Reception at trial, see **TRIAL**, 3, 7.

Sufficiency of to sustain findings or verdicts, see **APPEAL AND
ERROR**, 43-53.

As to particular facts or issues:

Hearsay, see **RAILROADS**, 3.

Res gestae, see **RAILROADS**, 2.

See **PARTNERSHIP**, 1.

Of adverse use, see **HIGHWAYS**, 3.

Of breach of contract and resulting injury to health, see
CARRIERS, 9.

Of contract for booming, see **LOGS AND LOGGING**, 1, 2.

Of contributory negligence of passenger, see **CARRIERS**, 4, 5,
10.

Of conversations, when all may be detailed, see **CONTRACTS**, 2.

Of damages, see **MALICIOUS PROSECUTION**, 1.

Of estoppel, see **ESTOPPEL**, 1-4.

Of expert as to signatures, offered in rebuttal, see **BILLS AND
NOTES**, 2.

Of fraud in procuring deed, see **WATERS**, 8.

Of oral agreement to contradict writing, see **CHATTEL MORT-
GAGES**, 1.

Of personal injuries, see **MASTER AND SERVANT**, 1, 2, 4-9.

Of prohibitive license fee, see **MUNICIPAL CORPORATIONS**, 9.

Of similar acts, see **FRAUD**, 1.

EVIDENCE—CONTINUED.

In actions by or against particular classes of parties: See CARRIERS, 4, 5, 9; BROKERS, 1; RAILROADS, 4-8.

In particular civil actions or proceedings: See QUIETING TITLE, 1-3.

On appointment of guardian, sufficiency and materiality, see GUARDIAN AND WARD, 2-4.

For breach of contract, see CONTRACTS, 1-3, 5, 9.

Of conversion, return of property, see CONVERSION, 1.

On note, see BILLS AND NOTES, 2-4.

For personal injuries, see MASTER AND SERVANT, 1, 2, 4-9.

For rescission of contract to sell land, see VENDOR AND PURCHASER, 2, 4-7.

In criminal prosecutions:

Contempt proceedings, see CONTEMPT, 1.

Of homicide, see CRIMINAL LAW, 5-7.

Of police officer as expert, see CRIMINAL LAW, 9.

Of rape, see CRIMINAL LAW, 3, 4.

1. **EVIDENCE—OPINIONS—EXPERTS.** In an action for personal injuries sustained through the alleged negligence of the captain of a boat in a collision with a drawbridge, it is proper to allow the captain to state his opinion as to whether he could have avoided the accident, where he has qualified and is testifying as an expert witness. *Lambert v. La Conner Trad. & Transp. Co.*..... 113
2. **EVIDENCE—WRITTEN CONTRACTS—VARYING BY PAROL—ADDITIONAL CONSIDERATION.** While the terms of a written contract may not be varied by parol, it is competent to show that, at the time of the making of a written contract of sale of land to a railroad company for a specified consideration, there was a collateral oral agreement to the effect that certain fences and guards were to be built and maintained by the company as part of the consideration for the sale, since oral testimony is competent to show a consideration additional to that expressed in the contract. *Windsor v. St. Paul etc. R. Co.*..... 156

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 11-13.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 21, 22.

EXCESSIVE DAMAGES:

See DAMAGES, 2.

EXECUTION:

1. **EXECUTIONS—SALE—VACATION—PARTIES ENTITLED TO NOTICE.**
The purchaser at an execution sale is not a party in interest upon whom notice of motion to vacate the sale must be served, where he had previously parted with his interest to the execution creditor, who appeared and contested the motion. *Bank v. Doherty.* 32
2. **SAME—VACATION FOR INADEQUACY OF PRICE—SEIZURE OF NOTE FILED AS RECORD IN CASE.** The sale under execution of a note and mortgage of the value of \$2,400, for \$110.20 (the costs upon an appeal), is properly vacated, where it appears, in addition to such inadequacy of price, that possession was obtained by seizing the same after they had been filed in the clerk's office as part of the record in said cause, without notice of the seizure to the owners, who shortly after the sale moved its vacation immediately upon learning thereof. *Id.*..... 32
3. **EXECUTIONS—SALES—BONA FIDE PURCHASER.** In this state an attaching creditor acquiring title to his debtor's realty is not a bona fide purchaser, and takes only the debtor's interest. *Lee v. Wrixon*..... 47

EXECUTORS AND ADMINISTRATORS:

See **WILLS.**

Of maker of note, see **PARTIES, 1.**

1. **EXECUTORS AND ADMINISTRATORS—CONTRACTS—PLEADING—COMPLAINT FAILING TO ALLEGE APPOINTMENT—SUFFICIENCY—DEMURRER.** In an action by executors upon a contract entered into with them as such, the complaint is sufficient, as against a general demurrer, although it fails to show by what court they were appointed executors, since they would prima facie have the right to enforce it. *Stein v. Waddell*..... 634

EXEMPTIONS:

To widow, delivery of, disobedience of order, see **CONTEMPT, 1.**

EXPERTS:

Captain of steamer, see **EVIDENCE, 2.**

EXTRADITION:

1. **EXTRADITION—FUGITIVE FROM JUSTICE—HABEAS CORPUS.** A prisoner held under an extradition warrant is entitled to a discharge on a writ of habeas corpus where it appears that he is not a fugitive from justice. *Poor v. Cudihee*..... 609

FACTORS:

See **BROKERS.**

FELLOW SERVANTS:

See MASTER AND SERVANT, 9.

FINES:

Illegal exaction on impounding sale, see ANIMALS, 2, 3.

FIRE DEPARTMENT:

Liability of city, see MUNICIPAL CORPORATIONS, 16-18.

FIRE INSURANCE:

See INSURANCE.

FISH:

1. **FISHERIES—LOCATION OF TRAPS—VALIDITY—EXPIRATION OR ABANDONMENT OF PRIOR LOCATION.** Where a fish trap location is originally invalid because of a prior conflicting one, it does not become valid upon the expiration, nor by the abandonment, of the prior location. *Womer v. O'Brien*..... 9
2. **SAME—ABANDONMENT OF SITE.** Under Laws 1899, p. 203, § 9, a trap location is not abandoned fifteen days before the expiration of the license, because of failure to construct a trap at that time, when the fishing season covered by the license had not expired at that time. *Id.*..... 9
3. **SAME—INJUNCTION—PARTIES—WAIVER OF OBJECTION.** In an action to enjoin the construction of a fish trap upon a location alleged to have been abandoned by the owner, the plaintiff can not show, upon its appearing that the location was not abandoned, that a third party was the real owner of the location, after having proceeded against the defendant as the owner thereof. *Id.*..... 9

FIXTURES:

Not covered by bulk stock laws, see FRAUDULENT CONVEYANCES, 1.

FORCIBLE ENTRY AND DETAINER:

See LANDLORD AND TENANT, 1, 2.

FORECLOSURE:

Of lien, see MECHANICS' LIENS, 1-4.

Of mortgage, see CHATTEL MORTGAGES, 2; MORTGAGES, 3-8, 14, 15.

FORFEITURES:

Of contract to purchase land, see VENDOR AND PURCHASER, 4-7.

Of franchise, see MUNICIPAL CORPORATIONS, 4, 5.

FORGERY:

Jurisdiction to enjoin collection of forged note, see EQUITY, 1.

FRANCHISES:

Grant by municipality, see MUNICIPAL CORPORATIONS, 2-5.

FRAUD:

See **BILLS AND NOTES, 3; FRAUDULENT CONVEYANCES; INSURANCE, 1-3.**

Corporate officers, see **CORPORATIONS, 3-5.**

Duress as defense to note of wife, see **HUSBAND AND WIFE, 3.**

Evidence of in procuring deed, see **WATERS, 8.**

Failure to accept offer of compromise, see **JUDGMENT, 7.**

Sales of realty, see **VENDOR AND PURCHASER, 1.**

Time for vacating judgment, see **JUDGMENT, 9.**

1. **FRAUD—EVIDENCE OF SIMILAR FRAUD UPON OTHER PARTIES.** Where insurance solicitors obtained the defendant's indorsement of a note by a device or trick whereby his signature to a contract penetrated through the paper on to the back of the note, without his knowledge, evidence is admissible that other parties living in the neighborhood were induced to give similar notes, and their indorsements were secured by the same solicitors, in the same manner, at about the same time, since it is competent to show that the acts complained of were part of a general scheme to perpetrate this kind of a fraud upon the people of that neighborhood. *Yakima Valley Bank v. McAlister* 566

FRAUDS, STATUTE OF:

Agreement for lease, part performance, see **LANDLORD AND TENANT, 3.**

Executed contract, see **VENDOR AND PURCHASER, 1.**

Part performance, see **SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 1.**

1. **FRAUDS, STATUTE OF—INDEFINITE LEASE—EVIDENCE AS TO PART PERFORMANCE.** Upon an issue as to whether there was part performance of an agreement for a lease by the taking of possession thereunder, evidence on behalf of the defendant is admissible to show the circumstances surrounding its execution, especially where the plaintiff seeks a reformation of the contract. *Browder v. Phinney* 70
2. **PLEADINGS—FRAUDS, STATUTE OF—PART PERFORMANCE OF LEASE—ADMISSIONS OF ANSWER.** In an action for the reformation of a contract for a lease, which was void under the statute of frauds without part performance by the taking of possession, an answer affirmatively alleging a termination of what plaintiffs claimed to be a tenancy does not admit the taking of possession thereunder, where such taking was first specifically denied. *Id.* 70

FRAUDS, STATUTE OF—CONTINUED.

3. **FRAUDS, STATUTE OF—VENDOR AND PURCHASER—PART PERFORMANCE OF ORAL SALE—POSSESSION.** The taking of a joint or divided possession, under an oral contract for the sale of an undivided one half interest in lands, is a sufficient part performance to take the same out of the operation of the statute of frauds, when coupled with payment of the purchase price, or the making of valuable improvements; nor is possession always a necessary element of part performance. *McKay v. Calderwood* 194

FRAUDULENT CONVEYANCES:

Consideration for joint note, see **HUSBAND AND WIFE**, 1, 2.

Selling all assets, see **CORPORATIONS**, 3.

1. **FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—STATUTES—CONSTRUCTION.** Laws 1901, p. 222, regulating the sale of "any stock of goods, wares or merchandise in bulk," does not apply to a cash register used in a saloon business to keep the accounts, and not for sale, but which was sold with the stock, fixtures and business, since the statute was intended to cover only the goods belonging to the mercantile stock or supply kept for sale. *Albrecht v. Cudihee*..... 206

FUGITIVE FROM JUSTICE:

See **EXTRADITION**, 1.

GOOD FAITH:

Of purchaser, see **VENDOR AND PURCHASER**, 3.

GOOD WILL:

See **SALES**, 1, 2.

GRANT:

Of right of way, acceptance by user, see **HIGHWAYS**, 8, 9.

GUARANTY:

See **INDEMNITY**.

GUARDIAN AND WARD:

1. **GUARDIAN AND WARD—FINAL ACCOUNT—COMPROMISE OF LITIGATION BY ORDER OF COURT—CONTRACT BY INDIAN—VALIDITY.** Where a suit has been commenced against an Indian and his guardian for a conveyance of lands, pursuant to a contract made by the Indian before the removal of restrictions upon the power of alienation, upon which contract \$1,600 had been paid to the Indian from time to time, the court may authorize the guardian to compromise the suit by the payment of \$2,000, regardless of the validity of the contract, where it appears that the land has be-

GUARDIAN AND WARD—CONTINUED.

come valuable, and the court finds it to be for the best interests of the estate to end the litigation; and after the guardian has made such payment under the order of court, the invalidity of the contract cannot be urged against the allowance of a credit for such payment in the guardian's final account, exceptions to which are properly overruled. *Terry v. Sicade*..... 249

2. **PARENT AND CHILD—GUARDIANS—APPOINTMENT—QUALIFICATIONS—CUSTODY OF INFANTS—FATHER IMPROPER PERSON.** After a decree of divorce for non-support awarding to the mother the custody of children between two and five years of age, the father, upon the mother's death, is not entitled to their custody and guardianship, where it appears that he was addicted to the use of liquor, was without a home or relatives to care for them, and was engaged as a waiter in a saloon, and had been in the habit of giving the children liquor; and a temporary appointment of their grandmother, who was found to be a suitable person, is proper and will not be disturbed where the trial court saw and heard the witnesses. *Russner v. McMillan*..... 416
3. **SAME—TEMPORARY GUARDIANSHIP—EQUITY POWERS OF COURT.** Upon conflicting applications of a father and a grandmother for the guardianship and custody of young children, where the father appears to be unfit to have their custody, the judgment awarding the custody to the grandmother may properly be made temporary in its character, and the children made wards of the court, for the purpose of changing the guardianship if the father should reform in the future and furnish proper assurances of his qualifications, or if the guardianship of the grandmother should become unsuitable, and the equitable jurisdiction of the court may be invoked in such a proceeding. *Id.*..... 416
4. **SAME—EVIDENCE OF FITNESS OF GUARDIAN—ADMISSIBILITY.** Upon an issue as to the fitness of a person to have the custody of children, it is proper to exclude evidence that one of the applicant's daughters had been arrested for vagrancy, where she had not had her custody or rearing and was in no way responsible therefor. *Id.*..... 416

HABEAS CORPUS:

- See EXTRADITION, 1.
- To admit to bail, see BAIL, 2.
- Attacking validity of decree of adoption, see JUDGMENT, 2.
- Order of discharge appealable, see APPEAL AND ERROR, 3.

HARMLESS ERROR:

- See ACTIONS, 1; APPEAL AND ERROR, 28-40; JUDGMENT, 8; TRIAL, 2, 10-12.
- In criminal prosecution, see CRIMINAL LAW, 6, 20-23.

HEALTH:

Contagious diseases, care of, see MUNICIPAL CORPORATIONS, 16-18.
Of passenger, injury to, see CARRIERS, 6-9.

HIGHWAYS:

Accidents at railroad crossings, see RAILROADS, 6-8.
Appointment of road supervisors, see CONSTITUTIONAL LAW,
5, 6.

1. **HIGHWAYS—ADVERSE USE—WAY BY PRESCRIPTION.** Where a county road has been generally traveled by residents and the public at large, adversely and continuously for more than twenty years, the use could not have been permissive, and it becomes a public road by prescription, regardless of work thereon at the public expense. *Seattle v. Smithers*..... 119
2. **SAME.** Bal. Code, § 3846, providing that the public working and use of a road for seven years shall be sufficient to constitute a road by prescription, does not require the expenditure of public work or money where the prescriptive period is co-extensive with the period of limitation for quieting title to land. *Id.*..... 119
3. **HIGHWAYS—RIGHT OF WAY BY PRESCRIPTION—ADJOINING OWNERS—EVIDENCE—SUFFICIENCY.** Where it appears that the owners of landlocked premises used a roadway across the lands of an adjoining owner and expended money in keeping it in repair, continually for nearly twenty years without hindrance from any person, a finding of a right of way by prescription is sustained, and will not be disturbed because of a conflict in the testimony as to the particular roadway actually traveled. *Van De Vanter v. Flaherty* 218
4. **SAME—DEFENSES—CONVEYANCE WITHOUT RESERVING RIGHT.** It is no defense to an action to establish a right of way by prescription across the lands of an adjoining owner, that the plaintiff formerly owned the lands subject to the use and mortgaged the same without reserving any right of way, defendants claiming through such mortgage, where, at the time of making the mortgage, the right of way existed in favor of other parties as apurtenant to the lands subsequently acquired by the plaintiff. *Id.* 218
5. **SAME—DEFENSE AS BONA FIDE PURCHASER.** In an action to establish a right of way by prescription across the lands of an adjoining owner, the defendants cannot claim as bona fide purchasers without notice of the easement, where the evidence warranted a finding that the roadway was well defined and apparent, nor where they had actual notice of it, and of plaintiff's claims thereto. *Id.* .. 218
6. **SAME—LOCATION OF ROADWAY—UNCERTAINTY IN DECREE—JUDGMENT—DEPARTURE FROM PLEADINGS.** In an action to establish a

HIGHWAYS—CONTINUED.

- right of way by prescription across the lands of an adjoining owner, the judgment will be reversed and remanded for further evidence as to the location, where the description in the decree is uncertain and a departure from the pleadings, and testimony was not received with a view of locating the road with any degree of certainty. *Id.*..... 218
7. SAME—WIDTH OF RIGHT OF WAY. A right of way by prescription is bounded by the line of reasonable enjoyment. *Id.*..... 218
8. HIGHWAYS—OVER PUBLIC LANDS—GRANT OF CONGRESS—CONSTRUCTION—ACCEPTANCE BY USER—COUNTY COMMISSIONERS' ACCEPTANCE. U. S. R. S. § 2477, granting a right of way for the construction of highways over public lands, is a grant *in praesenti* becoming effective upon user by the public without any formal action on the part of the state; and actual continuous user for seven years by the general public before entry by a homesteader, constitutes such acceptance of the grant; and an acceptance by the county commissioners under Laws 1903, p. 155, is not necessary, that act providing that nothing therein contained shall invalidate "acceptance of such grant by general public use." *Okanogan County v. Cheetham*..... 682
9. SAME—PRESCRIPTION. In such a case, the ten years' user required for prescription is not essential, as it is not a question of prescription, but one of acceptance of a grant. *Id.*..... 682

HOLIDAYS:

Contract to pack fish, Sunday excluded, see **CONTRACTS**, 4.

HOMICIDE:

See **CRIMINAL LAW**, 5-7, 19-23.

By Indian, on reservation, jurisdiction, see **INDIANS**, 1.

HUSBAND AND WIFE:

Necessary party to action for personal injuries, amendment, see **PARTIES**, 2.

Wife necessary party to foreclosure, see **MORTGAGES**, 8.

1. HUSBAND AND WIFE—CONTRACTS—JOINT NOTE—CONSIDERATION—LIABILITY OF WIFE'S SEPARATE ESTATE. The obligation of a husband as a member of a firm, to pay his pro rata share of the firm indebtedness, being a community debt, is a sufficient consideration for the joint note of the husband and wife, and for the transfer of the separate property of the wife to the husband's partner, who had paid the firm debt out of his individual estate. *Lumbermen's Nat. Bank v. Gross*..... 12
2. SAME—ASSIGNMENT OF WIFE'S SEPARATE ESTATE TO PAY JOINT DEBT—FRAUDULENT CONVEYANCES. The joint note of a husband

HUSBAND AND WIFE—CONTINUED.

and wife binds the wife's separate property, and an assignment of her separate property in payment of the same is not fraudulent as to creditors as being without consideration. *Id.*..... 18

3. DURESS—BILLS AND NOTES—HUSBAND AND WIFE—NOTE OF WIFE TO AVOID CRIMINAL PROSECUTION OF HUSBAND. Duress is a valid defense to a promissory note which was made by a married woman in payment of her husband's debts to avoid a threatened criminal prosecution against her husband. *Delta County Bank v. McGranahan*..... 307

IMPRISONMENT:

See BAIL.

IMPROVEMENTS:

As part performance, see FRAUDS, STATUTE OF, 3.

By co-tenant, see TENANCY IN COMMON, 2.

By mortgagee in possession, see MORTGAGES, 11.

Public improvements, see MUNICIPAL CORPORATIONS, 10-12.

Recovery of value by bona fide occupants, see STATUTES, 2.

INDEMNITY:

Against mechanics' lien, see MECHANICS' LIENS, 1.

1. INDEMNITY—PRINCIPAL AND SURETY—CONTRACTOR'S BOND TO COMPLETE VESSEL—NOTICE OF DEFAULT—FAILURE TO GIVE WITHIN TIME—RELEASE OF SURETY—DEMURRAGE FOR DELAY. Where a contractor's indemnity bond provided that notice of any default by the contractor must be given the surety within thirty days, and the contract provided that the hull of the vessel should be ready for machinery September 15, and completed ready for trial October 15, and notice of default in both particulars was given October 17, together with a demand that the surety complete the contract, the failure to give notice of the first default within thirty days releases the surety from liability for the demurrage charged for the non-completion of the vessel on time, since the law cannot say how much of the demurrage would have been saved by timely notice; but the surety is not released from liability for the cost of completing the vessel, where it refused to complete the same and where the failure to give notice of the first default did not affect the relation of the surety with reference to the second default; since a compensated surety can only insist upon forfeiture clauses where the failure to comply therewith probably inflicts a loss on the surety. *Heffernan v. U. S. Fidelity etc. Co.* 477
2. INDEMNITY—BUILDING CONTRACT—BONDS—GUARANTY OF PERFORMANCE—BREACH—ACTION ON BOND BEFORE PAYING CLAIMS.

INDEMNITY—CONTINUED.

Where an indemnity bond provides that the contractor shall faithfully perform all the terms of the contract, and the contractor, having finished the building, left the state without paying claims for labor and materials, the surety is liable immediately for the breach of the contract, and the owner may sue on the bond without first paying the claims or becoming obligated to do so by judgment. *Trinity Parish v. Aetna Indemnity Co.*.... 515

3. SAME—NOTICE OF LOSS—WAIVER OF COMPLETION OF BUILDING. Where an indemnity bond guaranteeing a building contract provided for immediate notice to the surety of acts of the contractor involving a loss, the failure to give notice of the non-completion of the building on time, or extending the time for completion as provided for in the contract, is a waiver of damages for its non-completion on time, but not for unpaid bills, as the surety cannot complain of a breach of the contract waived by the owner which does not operate to the prejudice of the surety. *Id.*..... 515
4. SAME—IMMEDIATE NOTICE—TEN DAYS. Where an indemnity bond guaranteeing a building contract provided for immediate notice to the surety of acts by the contractor involving a loss, and the contractor left the state without paying claims for labor and materials, notice of the unpaid claims, given within ten days after knowledge thereof by the owner, is a sufficient notice under the bond. *Id.*..... 515
5. SAME—ACTION ON BOND BEFORE PAYMENT OF CLAIMS—ESTABLISHMENT OF CLAIMS—SUBROGATION OF AMOUNT DUE TO PRIMARY PAYMENT OF CLAIMS. In an action upon an indemnity bond guaranteeing the faithful performance of a building contract, to recover the amount of unpaid bills for labor and materials, in which the claimants for labor and materials are made parties and their claims established, it is proper to subrogate the amount due on the bond to the primary payment of the claims, where the surety was given an opportunity to contest the claims and failed to do so, since it became bound therefor to the extent of its liability on the bond. *Id.*..... 515

INDIANS:

Void contract to sell land, compromise of suit, see GUARDIAN AND WARD, 1.

1. INDIANS—CRIMINAL LAW—OFFENSE COMMITTED ON RESERVATION—INDIANS NOT SUSTAINING TRIBAL RELATIONS—COURTS—JURISDICTION OVER ALLOTTED RESERVATION. The state courts have jurisdiction over homicides committed by one Puyallup Indian against another on the Puyallup Indian reservation, it appearing that the reservation had been allotted in severalty, all restrictions against

INDIANS—CONTINUED.

alienation removed, and no agency or government control maintained, and that the Indians thereon had maintained no tribal relations for years, but were qualified electors and had adopted the customs, laws and precinct offices of the Whites, since Act Cong., 23 Stat. 385, conferring jurisdiction of such offenses upon the federal courts applies only to Indians sustaining tribal relations. *State v. Smokalem*..... 91

INDORSEMENT:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 2, 3.

INFANTS:

See **GUARDIAN AND WARD**; **PARENT AND CHILD**, 1, 2.
Committed to reform school, see **BAIL**, 1.

INJUNCTION:

Against fish-trap, see **FISH**, 3.
Against co-tenant, see **TENANCY IN COMMON**, 1.
Against use of street by railway, see **MUNICIPAL CORPORATIONS**, 14.
Diversion of water, see **WATERS AND WATER COURSES**, 11, 12.

INSANITY:

Damages for inquisition of lunacy, see **MALICIOUS PROSECUTION**, 1.

INSOLVENCY:

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**; **BANKRUPTCY**; **CORPORATIONS**, 3.

INSPECTION:

Duty of master to inspect appliances, see **MASTER AND SERVANT**, 3-6.

INSTRUCTIONS:

Harmless error in, see **APPEAL AND ERROR**, 37, 38.
In civil actions, see **CARRIERS**, 2; **MASTER AND SERVANT**, 3, 5; **TRIAL**, 2, 4, 8, 9.
In criminal prosecutions, see **CRIMINAL LAW**, 19-23.
On measure of damages, see **WATERS**, 15.

INSURANCE:

1. **INSURANCE—FALSE STATEMENTS IN APPLICATION—FRAUD OF AGENT—IGNORANCE OF INSURED—WARRANTY.** A fire insurance policy is not void by reason of false statements contained in the application, inserted by the agent without the knowledge of the

INSURANCE—CONTINUED.

insured, where the exact truth was stated to the agent, and the insured signed the application relying upon the agent's statement that it was correct, and had no actual knowledge of limitations upon the agent's authority, or of a warranty clause printed in small type in the application. *Foster v. Pioneer Mut. Ins. Co.* 288

2. **SAME—POLICY—CLAUSE REQUIRING WRITTEN AUTHORITY—SOLICITOR AGENT OF COMPANY—KNOWLEDGE OF.** A provision in a policy of insurance to the effect that no person unless authorized in writing shall be deemed the agent of the company, does not make a solicitor the agent of the insured, but he is the agent of the company, and his knowledge of matters material to the risk becomes the knowledge of the company. *Id.*..... 288

3. **SAME—LIMITATION UPON AUTHORITY OF AGENT—NOTICE TO INSURED—STATEMENTS OF AGENT.** A clause in an application limiting the authority of an insurance agent in respect to statements not contained in the application, does not charge the insured with knowledge of such limitation, where it is printed in very small type, and the insured in good faith pays for the insurance through the same agent, in reliance upon statements of the agent not contained in the application. *Id.*..... 288

INTENT:

Constitutes contract of indorsement, see **BILLS AND NOTES**, 3.

INTEREST:

See **USURY**.

Increase after maturity, see **MORTGAGES**, 9.

On taxes paid, see **MORTGAGES**, 10.

INTERPLEADER:

Money judgment in, see **APPEAL AND ERROR**, 19.

JOINER:

Of causes of action, see **ACTION**, 1.

Of parties in civil actions, see **PARTIES**.

JOINT TENANCY:

See **TENANCY IN COMMON**.

Possession by joint tenant, see **FRAUDS, STATUTE OF**, 3.

JUDGES:

Comments on evidence in instructions, see **TRIAL**, 2.

JUDGMENT:

Appealable orders, see **APPEAL AND ERROR**, 1-7.

Against sureties on cost bond, nullity, see **COSTS**, 2.

JUDGMENT— CONTINUED.

Duration, see LIMITATION OF ACTIONS, 2.

Foreign administration, conclusiveness as to inheritance tax, see WILLS, 1.

Foreclosure, see MORTGAGES, 15.

For money, see APPEAL AND ERROR, 19.

Payment, cessation of controversy, see APPEAL AND ERROR, 7.

Res judicata, order of discharge, collateral attack, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 3.

Res judicata, order refusing to vacate attachment, see ATTACHMENT, 1, 3.

Uncertainty in decree, see HIGHWAYS, 6.

1. JUDGMENT—RES ADJUDICATA—POSSESSORY RIGHT TO MINING CLAIM—NEITHER PARTY ENTITLED TO. A judgment in a former action to quiet title to the possessory rights of mining claims decreeing that neither of the parties were entitled to possession, is *res adjudicata* as to the parties and their successors in interest, as to their rights at that time, in subsequent litigation to quiet the title after a relocation of the claims. *Lauman v. Hooper* 382
2. JUDGMENTS—RES ADJUDICATA—VALIDITY OF DECREE OF ADOPTION—DETERMINED IN HABEAS CORPUS PROCEEDINGS BETWEEN SAME PARTIES—COLLATERAL ATTACK. The validity of a decree of adoption, litigated and determined in a habeas corpus proceeding, is *res adjudicata*, in a subsequent proceeding between the same parties to vacate the decree of adoption, and it is immaterial that the decree was only collaterally attacked in the habeas corpus proceedings, where the adverse party waived the form of attack and its validity was determined by a court of competent jurisdiction. *In re Clifford*.. 460
3. EVIDENCE—ACTION TO QUIET TITLE—JUDGMENT—RES ADJUDICATA AS TO INDEBTEDNESS OF DEFENDANT. In an action to quiet title to lands sold under a judgment against the defendants, evidence that the defendants were not indebted, at the time the judgment was entered, is inadmissible, where it appears that the judgment was duly entered after personal service, since the judgment was *res adjudicata*. *Lilly v. Eklund*..... 532
4. JUDGMENTS—VACATION—ATTACK BY MOTION—LIMITATION—FAILURE TO DENY ALLEGATION. A motion to vacate a judgment valid on its face, for alleged want of service of process, must be denied when it was not filed until after the statutory period for such an attack, and the failure to deny the allegation as to want of service does not warrant the granting of the motion. *Scott v. Hanford* 5

JUDGMENT—CONTINUED.

5. JUDGMENT—VACATION—VOID PROCESS—RECITALS AS TO DUE SERVICE. The recital in a tax foreclosure judgment of due service of process is sufficiently overcome where it clearly appears from a void summons by publication, the sheriff's return, the proof of publication, the fact of the death of the principal defendant prior to service, and the testimony of the plaintiff in the tax suit, that the only service of process was by the publication of a summons which was insufficient to confer jurisdiction. *Dolan v. Jones*.. 176
6. JUDGMENT—VACATION—PROOF OF SERVICE—RECORD FAILING TO SHOW—IRREGULARITY—DEFAULT. Failure of the record to show proof of service of the summons is merely an irregularity that does not affect the jurisdiction of the court to render judgment, where the court has found that default was duly entered. *Twigg v James*... 434
7. JUDGMENT—VACATION—FRAUD—FAILURE TO ACCEPT OFFER OF COMPROMISE. A judgment of foreclosure entered upon default duly taken will not be set aside on the ground of fraud, in that plaintiff's counsel failed to submit to his client a proposition of settlement made by the defendants as he agreed to do, where it is not shown that defendants were misled by any false statement. *Id*..... 434
8. JUDGMENT—VACATION—NO MERITORIOUS DEFENSE—FORECLOSURE DECREE FOR SUM NOT SECURED—SALE FOR LESS SUM. Where a judgment of foreclosure was entered for the amount of two notes, only one of which was secured by the mortgage, and at the sale the premises were bid in for less than the amount of such note, a deficiency judgment for the balance is not subject to attack where it is not disputed that the indebtedness upon the other note was valid, due, and unpaid. *Id*..... 434
9. JUDGMENT—VACATION—TIME AND METHOD OF FILING APPLICATION. Under Bal. Code, §§ 5153, 5156-7, an application to vacate a judgment for fraud in obtaining it must be made by petition within one year, by the notice prescribed, or by bill in equity, and cannot be made by special appearance in the action five years after entry of the judgment. *Id*..... 434
10. JUDGMENT—VACATION—PARTIES—SUBSTITUTION BY STIPULATION. Upon a petition to vacate a judgment, a stipulation providing that certain named persons are to be considered as the real parties in interest instead of specified parties to the judgment, amounts to an agreed substitution. *Collins v. Kinnear*..... 453
11. JUDGMENT—VACATION—SUBSEQUENT JUDGMENT ON MOTION FOR NEW TRIAL. After a final judgment is entered in the cause, a subsequent judgment for the opposite party, entered upon a mo-

JUDGMENT—CONTINUED.

tion for a new trial, without disposing of or mentioning the first judgment, does not operate as a vacation of the first judgment, and is void, since the entry of a subsequent judgment is not a method provided by law for disposing of the first judgment.

Buffalo Pitts Co. v. Dearing..... 591

12. JUDGMENT—VACATION—COLLATERAL ATTACK UPON SUBSEQUENT JUDGMENT AFTER VACATING VOID DECREE. Where a default judgment is, on motion of the plaintiff, found to be fraudulently entered and void, it may be vacated and a new judgment entered in accordance with the demand of the complaint, without notice to the defendants; and, upon a collateral attack, the subsequent judgment will be presumed to have been made on sufficient showing, nothing appearing to the contrary in the record. *Morrison v. Berlin* 600
13. JUDGMENT—JURISDICTION—DIRECT ATTACK. Upon a direct appeal from a judgment, jurisdiction must appear on the face of the record. *Trumbull v. Jefferson County*..... 604

JUDICIAL SALES:

On execution, see EXECUTION, 1-3.

Of forfeited leasehold, see LANDLORD AND TENANT, 5.

Possession of mortgagee under void sale, see MORTGAGES, 3-7.

Validity of sale of impounded animals, see ANIMALS, 1-3.

JURISDICTION:

See APPEAL AND ERROR, 4-6; EQUITY, 1.

Amount in controversy, see APPEAL AND ERROR, 4-6.

Appointment of guardian, see GUARDIAN AND WARD, 3.

Effect of appearance, see APPEARANCE.

Foreclosure, see MORTGAGES, 15.

Habeas corpus to admit to bail, see BAIL, 2.

Mandamus to compel court to exercise, see MANDAMUS, 1.

Process to support, see PROCESS, 1.

Probate proceedings, see WILLS, 1.

To enter default, see JUDGMENT, 6.

When to appear on face of record, see JUDGMENT, 13.

JURY:

Disqualification or misconduct ground for new trial, see NEW TRIAL, 1.

Instructions in civil actions, see TRIAL, 2, 4, 8, 9.

Instructions in criminal prosecutions, see CRIMINAL LAW, 19-23.

1. JURY—APPEAL—RIGHT TO JURY TRIAL ON APPEAL FROM POLICE TO SUPERIOR COURT. Laws 1903, p. 34, providing for the right

JURY—CONTINUED.

of appeal from the police court to the superior court, carries the right to a full trial by jury, and is not limited merely to review for error. *Spokane v. Smith*..... 583

KNOWLEDGE:

Affecting assumption of risks by servant, see MASTER AND SERVANT, 1, 4, 7.

LABOR:

Eight hour day, see CONSTITUTIONAL LAW, 7.

LACHES:

In rescission of contract of sale, see VENDOR AND PURCHASER, 6.

LANDLORD AND TENANT:

Oral contract for lease, see FRAUDS, STATUTE OF, 1, 2.

1. LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—PLEADINGS—COMPLAINT—ALLEGATION OF TITLE—SUFFICIENCY. In an action of forcible entry and detainer, a complaint alleging that the defendant entered premises as tenant of another, and that subsequently the premises were decreed to the plaintiff and that plaintiff is now the owner thereof, sufficiently alleges plaintiff's title, as against a demurrer, and that he was entitled to the rent, within Pierce's Code, § 1170. *State v. Pittenger*..... 384
2. SAME—JUDGMENT—RENT ACCRUING AFTER FILING OF COMPLAINT—PLEADING—SUPPLEMENTAL COMPLAINT. In an action of forcible entry and detainer in which the complaint demands judgment for the rent for specified months, the plaintiff is not entitled to judgment for rent maturing after the filing of the complaint, where no supplemental complaint was filed; and the amount found due as such rent cannot be sustained as damages, but the judgment is excessive to that extent. *Id.*..... 384
3. LANDLORD AND TENANT—AGREEMENT FOR LEASE—INDEFINITE DESCRIPTION—VALIDITY—PART PERFORMANCE—FRAUDS, STATUTE OF. An agreement to lease premises which are indefinitely described, signed only by the agent of the owner, is not enforceable as a lease without a part performance sufficient to take the same out of the operation of the statute of frauds. *Browder v. Phinney*..... 70
4. LANDLORD AND TENANT—TERMINATION OF TENANCY—EVIDENCE. A termination of the tenancy is sufficiently shown by evidence to the effect that repairs were begun and \$2,000 expended by the landlord after the tenants stated that they did not wish to longer retain the premises. *Id.*..... 70
5. LANDLORD AND TENANT—LEASE—MECHANICS' LIEN—INTEREST OF LESSEE—FORFEITURE FOR CONDITION BROKEN—JUDGMENT—EXECU-

LANDLORD AND TENANT—CONTINUED.

TION SALE—TITLE. Where a mechanics' lien was foreclosed against the leasehold estate of a tenant, who had erected a building on the leased premises, and before sale the lease was declared forfeited for non-payment of the rent, and the landlord recovered possession, an execution sale under the lien foreclosure, made after the re-entry by the landlord, conveys no title, although the lien holder was not a party to the decree forfeiting the lease; since performance, or tender of performance, of the lease, before peaceable re-entry for condition broken, was essential to prevent a forfeiture of the leasehold estate upon which the judgment was a lien. *Stetson etc. Mill Co. v. Pac. Amusement Co.*..... 335

6. **LANDLORD AND TENANT—NEGLIGENCE—DANGEROUS PREMISES—REPAIRS—INJURY TO STRANGER—TENANT PRIMARILY LIABLE FOR—TENANCY.** A landlord is not liable for injuries sustained by a stranger through a defect in an approach to a dwelling-house, included in the lease and under the exclusive control of the tenant, where there is no evidence that the defect existed at the time of the making of the lease, and in the absence of an express agreement to make repairs, since the duty devolves primarily upon the tenant. *Ward v. Hinkleman* 375
7. **SAME—TENANCY FROM MONTH TO MONTH—COMMENCEMENT OF TERM.** In the case of a tenancy from month to month, the tenancy is deemed to be a continuing one, and the liability of the landlord for repairs depends upon the condition of the premises at the beginning of the first monthly tenancy. *Id.*..... 375

LANDS:

See PUBLIC LANDS.

Allotted on reservation, see INDIANS, 1.

LARCENY:

See CRIMINAL LAW, 8.

LAST CLEAR CHANCE:

See RAILROADS, 8.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

See CONSTITUTIONAL LAW, 5, 7.

LICENSES:

Injuries to licensees, see RAILROADS, 4-5.

Of dentists, see CONSTITUTIONAL LAW, 1-4; CRIMINAL LAW, 1, 2.

Of peddlers, see MUNICIPAL CORPORATIONS, 6-9.

To fish, see FISH, 1-3.

LIENS:

See **MECHANICS' LIENS.**

For boomage charges, see **LOGS AND LOGGING**, 1, 2.

LIGHT AND POWER PLANTS:

Franchise for, power of city to grant, see **MUNICIPAL CORPORATIONS**, 2, 3.

LIMITATION OF ACTIONS:

By stipulations of bond, date of first breach, see **INDEMNITY**, 1.

Foreclosure, see **MORTGAGES**, 1-3, 7.

1. **LIMITATIONS OF ACTIONS—MORTGAGES—BILLS AND NOTES—EXTENSION OF TIME—FAILURE TO PAY INSTALLMENTS.** A provision in an agreement to extend the time of payment of a mortgage note, to the effect that the note shall become due without notice upon the failure to pay any installment of interest, does not mature the note or start the running of the statute of limitations upon the failure to pay an installment when due; since the provision is for the benefit of the mortgagee, and may be waived. *White v. Krutz* 34
2. **STATUTE OF LIMITATIONS—JUDGMENTS—MUNICIPAL CORPORATIONS—STREET ASSESSMENT LIENS—ENFORCEMENT OF, WITHIN SIX YEARS—QUIETING TITLE.** A street assessment lien being subject to the statute of limitations, a judgment therefor becomes inoperative for any purpose, under Bal. Code, §§ 5149, 5150, after the lapse of six years, as in the case of other judgment liens. *Hinckley v. Seattle*. 269

LOCATION:

Of mining claim, see **MINES AND MINERALS**, 1.

LOGS AND LOGGING:

Obstruction of navigable slough, see **WATERS**, 14, 15.

Use of stream for logging purposes, see **WATERS**, 13.

1. **LOGS AND LOGGING—LIEN FOR BOOMAGE CHARGES—EVIDENCE OF AGREEMENT FOR—SUFFICIENCY.** Where a boom company's boom was broken, and it was hung by a logging company, whose logs were thereupon caught therein, findings that there was no request or contract to catch and hold the logs and consequently no lien for the boomage charges, are sustained where there was evidence that the president of the boom company gave the manager of the logging company permission to hang and use the boom without charge, and the fact that the president was without authority so to do is immaterial since there was no request or contract for boomage services. *Cascade Boom Co. v. McNeeley Log. Co.*.... 203

LOGS AND LOGGING—CONTINUED.

2. SAME—FAILURE OF LIEN—RENTAL VALUE OF BOOM USED—PLEADING AND PROOF. In an action to foreclose a lien on logs for boomage charges, where it appears that the boom company performed no services, but its boom was hung and used by defendant, there can be no recovery for the rental value of the boom, upon plaintiff's failure to establish the lien, when there is nothing in the complaint on which to base such claim, and no evidence to show such rental value. *Id.* 203

MALICIOUS PROSECUTION:

1. MALICIOUS PROSECUTION—INQUISITION OF LUNACY—EXCESSIVE DAMAGES. In an action for prosecuting a malicious inquisition of lunacy, wherein the plaintiff was arrested and confined until the following day, and in which the testimony disclosed no injury to plaintiff's person or health, it is not an abuse of discretion to grant a new trial on the ground that a verdict for \$1,916 was excessive. *Wait v. Robertson Mfg. Co.* 282

MANDAMUS:

To compel city attorney to approve cost bill, see APPEAL AND ERROR, 5; MUNICIPAL CORPORATIONS, 19-22.

- 1 MANDAMUS—CESSATION OF CONTROVERSY. A writ of mandate to compel the superior court to proceed with the trial of a case, pending an appeal from an interlocutory order, will not be granted where, before the hearing thereon, the appeal was determined, and the trial court only refused to proceed pending said appeal, since the controversy has ceased to exist. *State ex rel Oudin etc. Co. v. Superior Court* 30

MARRIED WOMAN:

Contracts of, see HUSBAND AND WIFE, 1-3.

MASTER AND SERVANT:

When servant not a passenger, see CARRIERS, 1.

1. MASTER AND SERVANT—INJURY TO SERVANT CAUGHT IN NARROW PASSAGE—ASSUMPTION OF RISKS. An employee engaged in driving a horse and truck load of lumber along a narrow passage way, who is injured by being caught between the load and a post, by reason of depressions in the floor and the slueing of the load, assumes the risks, where all the conditions are open and apparent and well known to him through employment in such service for more than a month. *Krickeberg v. St. Paul etc. Lum. Co.* 63
2. MASTER AND SERVANT—NEGLIGENCE OF CAPTAIN OF BOAT—EVIDENCE IN REBUTTAL. Upon an issue in an action for personal injuries as to the negligence of the captain of a boat which collided

MASTER AND SERVANT—CONTINUED.

with a drawbridge, it is proper to exclude evidence in rebuttal to the effect that the captain asked the bridge tender whether the bridge could not be further opened, in time to have enabled him to avoid the accident, as, the captain having testified that he called out, it was not impeaching his evidence and the question of distance was a part of the plaintiff's case in chief. *Lambert v. La Conner Trad. & Transp. Co.*..... 113

3. MASTER AND SERVANT—NEGLIGENCE—DUTY TO FURNISH SAFE APPLIANCES—PLEADING—COMPLAINT—SUFFICIENCY. A complaint in an action for personal injuries sustained by a stevedore in defendant's employ, through the breaking of a rope sling, is not insufficient in containing the erroneous statement that it was the defendant's duty to furnish the very best and safest sling available, when a breach of duty in using an unsafe and rotten rope is otherwise sufficiently alleged. *Henne v. Steeb Shipping Co.*.... 331
4. SAME—UNSAFE ROPE SLING—PLEADING AND PROOF—EVIDENCE—ASSUMPTION OF RISKS. In an action by an experienced stevedore against his employer for personal injuries sustained through the breaking of a rope sling, alleged to have become rotten and unsafe, it is not admissible to show that rope slings are not in general use and that chain or wire slings are safer; since (1) the use of a rotten rope sling is the only negligence alleged, and (2) the damages incident to the use of a sufficient rope sling were assumed by the plaintiff. *Henne v. Steeb Shipping Co.*..... 331
5. SAME—EVIDENCE—INSTRUCTIONS—CURING ERROR. Error in the admission of such evidence is not cured by an instruction to the effect that the defendant owed the duty to use care in the selection of the rope in question, since the jury could assume from the charge and the evidence that any rope sling was insufficient. *Id.* 331
6. SAME—PLEADING AND PROOF—INSUFFICIENT ROPE SLING—PROOF OF OVERLOADING. In an action for personal injuries sustained through the breaking of a rotten rope sling, evidence of the overloading of the sling is admissible to show negligence in the use of the sling, although overloading is not alleged as a distinct ground of negligence. *Id.*..... 331
7. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INJURY TO OPERATOR OF SAW—REMOVAL OF SAWDUST WITHOUT STOPPING SAW—NONSUIT. The operator of a re-saw, who is injured in removing sawdust while the saw was in motion, is guilty of contributory negligence, and a nonsuit is properly granted, where it appears that he could have stopped the saw for that purpose and obviated the danger, without stopping the other machinery in the mill.

MASTER AND SERVANT—CONTINUED.

that the danger of removing the sawdust while the saw was in motion was open and apparent, and that in attempting to remove the sawdust without stopping it, he slipped and threw his hand into the saw. *Beltz v. American Mill Co.*..... 399

8. SAME—EVIDENCE — OPERATION OF SAW — CROSS-EXAMINATION TENDING TO SHOW CONTRIBUTORY NEGLIGENCE. In an action for personal injuries sustained by the operator of a re-saw in attempting to remove sawdust while the saw was in motion, where the plaintiff testified at length as to the necessity of so doing, the mode of operation, and construction of the machine, it is proper to ask on cross-examination how often the saw was stopped to permit the removal of sawdust, and the manner of stopping the saw; and the fact that such evidence tended to show contributory negligence is not a valid objection thereto. *Id.*..... 399

9. MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT—INJURY TO EMPLOYEE ENGAGED IN PAINTING ENGINE BY ACT OF TESTER PUTTING THE SAME IN MOTION. Where two employees of the defendant were engaged in painting an engine just completed in defendant's shops, and ceased work to enable another employee to test the engine, and after a short time one of the painters informed the other that the testing was completed and they could return to work, whereupon he proceeded to do so, but the engine tester returned and put the engine in motion thereby injuring the painter's foot in the machinery, the men are fellow servants engaged in a common employment, and the master is not liable. *Millett v. Puget Sound Iron etc. Works.*..... 438

MECHANICS' LIENS:

Estoppel to deny that material is part of realty, see ESTOPPEL, 3.

Liability on bond, before establishment of claims, subrogation, see INDEMNITY, 2, 5.

On leasehold, forfeiture of lease, see LANDLORD AND TENANT, 5.

1. MECHANICS' LIENS—INDEMNITY—WAIVER OF LIEN BY CONTRACTOR'S BOND AND AGREEMENT—ASSIGNMENT. Where a contractor gives an indemnifying bond to protect the owner against liens, and also agrees with the surety company to prevent the filing or enforcement of liens against the property, he waives his right thereto, and neither he nor his assignee can enforce a lien against the property. *Kent Lumber Co. v. Ward.*..... 60
2. MECHANICS' LIENS—DATE OF COMPLETION OF WORK—SUPPLYING OMISSIONS AFTER ACCEPTANCE OF BUILDING. Where a building was accepted as completed in October, and a mechanics' lien was not filed until April, findings to the effect that the lien was not

MECHANICS' LIENS—CONTINUED.

filed within the required time after the completion of the building are sustained, notwithstanding that, on January 6, metallic flashings, that had been inadvertently omitted, were put over six windows on the demand of the owner, and on February 16, certain drain tile was relaid, where it appears that such work was in the nature of repairs to remedy defects not apparent at the time of the acceptance of the building. *Ellsworth v. Layton*.... 340

3. **MECHANICS' LIENS — FORECLOSURE — ATTORNEY'S FEES—ALLOWANCE IN SUPREME COURT.** In an action to foreclose a mechanics' lien, in which the trial court fixed the amount of the attorney's fees, independent attorney's fees will not be allowed in the supreme court upon affirming the judgment. *Lavanway v. Cannon* 593

4. **MECHANICS' LIENS — FORECLOSURE — PARTIES — LIENORS SUBSEQUENT TO COMMENCEMENT OF ACTION—PRACTICE.** In an action by a contractor to foreclose a mechanics' lien, in which the owner answers that a materialman had filed a lien for material which the contractor had agreed to pay, it is not error to deny defendant's motion to make the materialman a party, where his lien was filed after the commencement of the action; since in such case, under the statute, the lien claimant cannot bring an independent action, and must himself apply to be joined by way of intervention. *Id.*..... 593

MINES AND MINERALS:

Possessory right, determined in former action, see JUDGMENT, 1.

1. **MINES AND MINING—RELOCATION OF CLAIM—UNOCCUPIED LAND—FINDINGS—REVIEW.** Where, immediately after entry of a judgment that neither of the parties had any possessory rights to mining claims, the plaintiffs relocated the same and did the necessary assessment work, a finding that the relocations were upon unoccupied land, and entitled plaintiffs to possession, is sustained. *Lauman v. Hooper*..... 382

MISREPRESENTATION:

By insured, see INSURANCE, 1-3.

MONTH:

Tenancy from month to month, see LANDLORD AND TENANT, 7.

MORTGAGES:

Assumption of, action on assigned coupons, discharge without taking up coupons, see BILLS AND NOTES, 4.
Cancellation for usury, see USURY, 2.

MORTGAGES—CONTINUED.

Covenants of seizin and warranty passing after-acquired title, see DEEDS, 1.

Discharge without taking up coupon notes, see ESTOPPEL, 4.

Personal property, see CHATTEL MORTGAGES.

1. MORTGAGES—EXTENSION OF TIME—RECORDING—NOTICE TO SUBSEQUENT PURCHASER. An extension of the time of the maturity of a mortgage note, made while the mortgagee still owns the property, need not be recorded, and is valid as against the mortgagor and subsequent purchasers without notice, so that the statute of limitations does not begin to run against an action of foreclosure until the expiration of such extension. *White v. Krutz*..... 34
2. MORTGAGES—REDEMPTION—ACTION FOR—LIMITATION OF ACTIONS. Where the mortgagee has been placed in possession for the purpose of collecting and applying the rents, and there has been no foreclosure, an action to redeem from the mortgage is not barred, since the statute of limitations does not commence to run while the relation of mortgagor and mortgagee exists. *Catlin v. Murray* 164
3. MORTGAGES—LIMITATION OF ACTIONS—MORTGAGEE IN POSSESSION. The statute of limitations does not run against the right of foreclosure as against a mortgagee in possession. *Investment Securities Co. v. Adams*..... 211
4. SAME—POSSESSION UNDER A VOID FORECLOSURE—PURCHASER AS ASSIGNEE. A mortgagee, who after default takes possession in good faith under a void foreclosure, holds as a mortgagee in possession regardless of the consent of the mortgagor, and a purchaser at such a void sale becomes the assignee of the mortgage. *Id.*..... 211
5. MORTGAGES—VOID FORECLOSURE SALE—MORTGAGEE IN POSSESSION. A purchaser or assignee in good faith under a void foreclosure sale becomes a mortgagee in possession. *Sloane v. Lucas*..... 348
6. SAME—VOID FORECLOSURE—RELIEF AGAINST MISTAKE—VACATING VOID DECREE—BRINGING IN NEW PARTIES. Where children of a deceased mortgagor were not made parties to the foreclosure action because unknown to the plaintiff, who in good faith took possession supposing that the full title was conveyed by the foreclosure sale, the mistake calls for equitable relief, and the proper course is to vacate the decree, allow the plaintiff to file an amended petition, and foreclose against the interest of the children. *Investment Securities Co. v. Adams* 211
7. SAME—EQUITY—ACCOUNTING—PAYMENT OF MORTGAGE DEBT. Where a void foreclosure decree is vacated at the instance of the plaintiff in order to bring in, as necessary parties, the children of

MORTGAGES—CONTINUED.

- a deceased mortgagor, who own a half interest in the property, the children are not entitled to plead the bar of the statute while the mortgagee was in possession, or to an equitable accounting for rents and profits, until they first do equity by paying the mortgage debt. *Id.*..... 211
8. **MORTGAGES — FORECLOSURE — PARTIES — HUSBAND AND WIFE—WIFE OF PURCHASER OF PREMISES.** The foreclosure of a mortgage against community property transferred by the mortgagor, is void where the wife of the purchaser is not made a party defendant. *Sloane v. Lucas* 348
9. **MORTGAGES—INTEREST—INCREASED RATE AFTER MATURITY—BILLS AND NOTES.** A stipulation in mortgage notes providing for an increased rate of interest after maturity, is valid. *Id.*..... 348
10. **SAME—INTEREST ON TAXES PAID.** It is proper to allow twelve per cent interest upon taxes paid by the mortgagee where the mortgage provides therefor. *Id.*..... 348
11. **MORTGAGES—ACTION TO REDEEM—MORTGAGEE IN POSSESSION—VALUE OF IMPROVEMENTS—INTEREST UPON—RENTAL VALUE.** In an action for an accounting, brought by mortgagors, against mortgagees in possession under a void foreclosure, it is proper to allow the defendants for the value of their improvements, with interest thereon from the time they were made, where the plaintiffs are allowed the rental value of the premises at a rate increased by the improvements, and where the plaintiffs had knowledge that the improvements were being made in the full belief of the legality of the defendants' title, and made no claim to the land for more than three years thereafter. *Id.*..... 348
12. **SAME—FORM OF DECREE—INTERLOCUTORY ORDER FIXING TIME FOR REDEMPTION—EQUITY.** In an action brought by mortgagors against mortgagees in possession under a void foreclosure, seeking to set aside the foreclosure decree and for an accounting for rents, it is proper to enter an interlocutory decree fixing 90 days within which the amount necessary to redeem from the mortgage debt shall be paid, and in default of such payment, dismissing the action and quieting the title of the defendants; since, either as an action to quiet title or to redeem, the plaintiffs must do equity before being entitled to relief against mortgagees in possession. *Id.*..... 348
13. **MORTGAGES—ADVANCE TO PURCHASE PROPERTY—ABSOLUTE DEED WITH BOND FOR DEED—REFORMATION.** Where the plaintiff held an option for the purchase of property and applied to the defendants for a loan secured by mortgage thereon, which was refused, but defendants did advance the money except \$1,000, upon a deed

MORTGAGES—CONTINUED.

executed to them, and gave plaintiff a bond for a deed in consideration of said sum of \$1,000 which was advanced by the plaintiff, the transaction is not a mortgage whereby the land is held as security for the advance, and plaintiff is not entitled to redeem therefrom as such, and this, independently of whether the bond for a deed imposed the obligation on him to repay the advance. *Conner v. Clapp* 299

14. **MORTGAGES—FORECLOSURE — PARTIES—TRUSTS—DEEDS—CONVEYANCE OF FEE TO TRUSTEE.** Where the owners of lands subject to a mortgage conveyed the same by warranty deed, in trust, "the same to be sold . . . and the proceeds thereof to be applied" to the indebtedness of the grantors, the balance of the proceeds, if any, to be returned to them, the entire fee passes to the trustee, the trust being personal and not running with the land, so that the *cestuis que trustent* are not necessary parties to an action to foreclose the mortgage, and their rights are cut off by foreclosure against the trustee while holding the title. *Thompson v. Price* 394
15. **MORTGAGES—FORECLOSURE—JUDGMENT—JURISDICTION TO GRANT RELIEF PRAYED—DEFAULT.** A judgment in foreclosure cannot be objected to for want of jurisdiction to grant the relief on the ground that the mortgage secured only one of the notes for which the judgment was entered, where the complaint alleged that it secured both notes and the defendants defaulted. *Twigg v. James* 424

MOTIONS:

Dismissal of appeal, see **APPEAL AND ERROR**, 27.
To vacate judgment, see **JUDGMENT**, 4.

MUNICIPAL CORPORATIONS:

See **COUNTIES**.

County is, see **EMINENT DOMAIN**, 1.

Eight hour day on public works, see **CONSTITUTIONAL LAW**, 7.

Power to impound and sell animals running at large, see **ANIMALS**, 1-3.

Street assessments, judgment for, barred by lapse of time, see **LIMITATION OF ACTIONS**, 2.

Water supply, see **WATERS AND WATER COURSES**, 1-12.

1. **MUNICIPAL CORPORATIONS—PARKS—DIVERSION TO ECONOMICAL USE—LANDS HELD IN FEE AND PAID FOR FROM GENERAL FUND—ABUTTING OWNERS.** A city of the first class, being authorized to acquire lands by purchase or otherwise and to dispose of the same, and to establish, regulate, control or vacate parks, and hav-

MUNICIPAL CORPORATIONS—CONTINUED.

- ing acquired lands in fee for the purpose of a public park by the right of eminent domain, may thereafter divert the same to an economic use by the erection thereon of a city building, where the lands appropriated were paid for by the city out of its general fund, as distinguished from a restricted donation or conveyance for park purposes, or from a purchase paid for by local assessments levied upon the property specially benefited thereby; and abutting owners cannot object to such diversion. *Seattle Land etc. Co. v. Seattle*..... 274
2. MUNICIPAL CORPORATIONS—CONTRACTS—LIGHTING STREETS—NECESSITY OF ADVERTISING FOR BIDS. A contract to furnish a town with electricity for street lighting purposes is not a contract for the erection or improvement of a public work, nor for "street work" within Laws 1903, p. 33, requiring such contracts to be submitted to competitive bidding. *Tanner v. Auburn* 38
3. SAME—CONTRACTS—EXTENDING BEYOND EXPIRATION OF TERM OF OFFICE. The mayor and council of a town may contract for lighting the streets for a period of time extending beyond the expiration of their terms of office. *Id.* 38
4. MUNICIPAL CORPORATIONS—STREET RAILWAYS — FRANCHISES—FORFEITURE—EXCUSE FOR FAILURE OF CONTRACTOR—ACCIDENT OR INABILITY TO OBTAIN MATERIAL. Where a street railway franchise provided for a forfeiture of security unless "in case of . . . accident . . . inability to obtain material . . ." etc., it would seem that it was not a sufficient excuse to fail to construct the line, that the requirement of the United States government for costly drawbridges across public waterways for a connecting line was prohibitory of the enterprise. *Furth v. West Seattle*... 387
5. SAME—FORFEITURE OF DEPOSIT—WRONGFUL APPROPRIATIONS—REMEDY—MINGLING WITH GENERAL FUND—TRUSTS—INJUNCTION. Where a certified check is deposited with a town clerk to be forfeited upon failure to comply with a street railway franchise, and, at the expiration of the time limited, the forfeiture is declared by the town council, and the check cashed and its proceeds mingled with the general funds of the town, without fraud on the part of the town, the proceeds are not held in trust nor can equity interfere, and injunction will not lie to prevent the amount from being drawn out of the general fund, the remedy for appropriating the check without right being an action at law. *Id.*..... 387
6. MUNICIPAL CORPORATIONS — PEDDLERS—LICENSE—ORDINANCES—CONSTRUCTION—EXEMPTION OF MERCHANTS. A provision in a section of an ordinance regulating peddlers from wagons, etc., that

MUNICIPAL CORPORATIONS—CONTINUED.

- "this section" shall not apply to storekeepers or merchants, must be construed to relate exclusively to said section and not to a subsequent section relating to the maintenance of booths, stands, etc., within a restricted district. *In re Garfinkle* 650
7. SAME. A clause in an ordinance excepting merchants from taking out a peddler's license, with the proviso that they shall not act as peddlers without first obtaining a license, is wholly ineffective as an exemption, leaving merchants in the same position as they would have been in without such clause. *Id.* 650
8. MUNICIPAL CORPORATIONS—PEDDLERS—LICENSE OF—TAXATION—EXCESSIVE LICENSE AS POLICE REGULATION—TAX FOR REVENUE—FINDINGS NOT SUPPORTING CONCLUSIONS. A finding that the amount of a peddler's license is not required by the city for purposes of police regulation does not sustain the conclusion that it is excessive and the ordinance void, since the city has a right, in addition, to impose a tax on peddlers for the purposes of revenue. *Id.* 650
9. SAME—EVIDENCE OF PROHIBITIVE LICENSE FEE—SUFFICIENCY—ELEMENT OF COMPETITION. Evidence that a license tax of \$100 for peddlers with two-horse wagons in the city of Seattle, where there were eighty people engaged in the business, was burdensome and prohibitive of the transaction of the business does not sustain a finding that the same is excessive, since the question must be determined irrespective of the element of competition, individual ability, and other facts, not related to the business under the most favorable conditions. *Id.* 650
10. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS OBJECTIONS—WAIVER. Objections going to the regularity of local improvement assessments must be first presented to the city council or they are waived. *Aberdeen v. Lucas* 190
11. SAME—WAIVER BY PETITIONING FOR IMPROVEMENT. One who petitions for local improvements cannot question the validity of the assessment unless the city council never had jurisdiction or so far departed from established methods as to lose jurisdiction. *Id.* 190
12. SAME—NOTICE—SUFFICIENCY—WHAT ORDINANCE GOVERNS. The twenty day notice to abutting owners of local improvement assessments provided for by a general ordinance contemplated by Laws 1890, need not be given where the assessment was made under Laws 1893, p. 171, and it is not questioned that the notice there provided for and given constituted due process of law. *Id.* 190
13. MUNICIPAL CORPORATIONS—STREETS—VACATION—DISCRETION OF CITY COUNCIL. The vacation of a street is a legislative question and within the discretion of the city council, and will not be

MUNICIPAL CORPORATIONS—CONTINUED.

disturbed in the absence of an abuse of discretion, or where the owners of abutting property may have requested such vacation.

Kakeldy v. Columbia & P. S. R. Co...... 675

14. SAME—BURDEN OF PROOF AS TO CHARACTER OF STREET—VACATION—PLEADING—AMENDMENT OF ANSWER. In an action to enjoin the use of a public street for railway purposes, in which the answer denied that the place was a public street, the burden of proof as to that fact is upon the plaintiff, and hence it is not error to permit a trial amendment to the answer setting up an ordinance vacating the place as a street prior to its use for railway purposes, the vacation being a matter of public record. *Id.*..... 675
15. MUNICIPAL CORPORATIONS — PERSONAL INJURIES — PRESENTING CLAIM BY MARRIED WOMAN—FAILING TO JOIN HUSBAND—OBJECTIONS. Under a city charter requiring claims for damages to be presented to the city council within thirty days, and providing that no action shall be maintained thereon until sixty days after such presentation, a claim for personal injuries presented by a married woman in her own name is sufficient to support an action therefor by the husband and wife, where the claim was not rejected by the city council on the ground that the husband was a necessary party thereto, or for any insufficiency in the notice, and where the claim was admitted in evidence without objection, and its sufficiency not questioned until after the findings of fact were filed; since the intent of the charter to give the city early notice was fulfilled, and the same is to be liberally construed. *Davis v. Seattle* 223
16. MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—INJURY TO TEAMSTER—NEGLIGENCE OF OFFICERS—GOVERNMENTAL FUNCTIONS. A city is not liable to a teamster in its fire department for injuries sustained while training horses, by reason of the negligence of the chief of the department in representing that a vicious horse was gentle, and in failing to supply a necessary appliance for the work, since there is no liability for the improper discharge of governmental functions by city officers. *Lynch v. North Yakima*. 657
17. MUNICIPAL CORPORATIONS—GOVERNMENTAL FUNCTIONS—CONTAGIOUS DISEASES—NEGLIGENCE OF OFFICERS. The care of persons afflicted with contagious diseases is a governmental function, so that the city is not ordinarily liable in damages for the negligence of its officers in performing the service. *Id.*..... 657
- 17a. SAME—VICIOUS HORSES—NOTICE—CONTRIBUTORY NEGLIGENCE. A teamster in a fire department who for seven weeks had been handling a team of horses, is bound to know whether they are vicious, and if so, he is guilty of contributory negligence in placing himself where he might be kicked. *Id.*..... 657

MUNICIPAL CORPORATIONS—CONTINUED.

18. SAME—ACTION FOR NEGLIGENTLY EXPOSING CITY EMPLOYEE TO SMALLPOX—CONTRIBUTORY NEGLIGENCE. In an action against a city for damages for negligently exposing an employee in the fire department to smallpox, the plaintiff is guilty of contributory negligence precluding a recovery where it appears that he remained in the room and proceeded to fumigate the afflicted person when he might have departed, that being no part of his duty. *Id.*..... 657
19. MUNICIPAL CORPORATIONS—ORDINANCES—COSTS IN POLICE COURT—APPROVAL OF COST BILL BY CITY ATTORNEY. Under an ordinance designating a fund from which to pay the witnesses subpoenaed by the city in police court trials, and providing for their payment upon the city attorney's approval of the cost bill, without making any provision for the defendant's costs, the city attorney is not required to approve the defendant's cost bill, although the city is liable therefor by statute, since the city's liability is not dependent upon the approval of the city attorney as a condition precedent. *Spokane v. Smith* 583
20. MUNICIPAL CORPORATIONS—PROSECUTION FOR VIOLATION OF ORDINANCES—LIABILITY FOR COSTS IN POLICE COURT—ACQUITTAL OF DEFENDANT—SAME COSTS IN SUPERIOR COURT. Where defendant is acquitted in the police court upon a charge of violating an ordinance, the city is liable for all costs, under Bal. Code, § 1627, and when he appeals from a conviction to the superior court and is there acquitted, he is entitled to the same costs, especially in view of Bal. Code, § 7009, providing that no prisoner who is acquitted shall be liable for costs. *Id.*..... 583
21. MUNICIPAL CORPORATIONS—ORDINANCES—COSTS IN POLICE COURT—APPROVAL OF COST BILL BY CITY ATTORNEY. An ordinance designating a fund from which to pay the witnesses subpoenaed by the city in police court trials, is not invalid by reason of failing to provide for payment of the defendant's witnesses, since mere silence as to defendant's witnesses does not negative the liability therefor provided by statute. *Id.*..... 583
22. SAME—COURTS—CRIMINAL LAW—VIOLATION OF ORDINANCE—CRIMINAL PROCEEDING. A proceeding in a police court for the violation of an ordinance, by which one is arrested and restrained of his liberty, is a criminal proceeding. *Id.*..... 583

NAVIGABLE WATERS:

See WATERS AND WATER COURSES.

NEGLIGENCE:

At crossing, see RAILROADS, 6-8.

NEGLIGENCE—CONTINUED.

- Of city officers, liability of city, see **MUNICIPAL CORPORATIONS**, 16-18.
- Dangerous premises, see **CARRIERS**, 2, 4, 5, 10.
- Demised premises, see **LANDLORD AND TENANT**, 6, 7.
- Collision with drawbridge, opinions, see **EVIDENCE**, 1.
- Contributory negligence of servant as question for jury, see **MASTER AND SERVANT**, 7-9.
- Of licensee, see **RAILROADS**, 4-5.
- Of passenger, see **CARRIERS**, 4, 5, 10.
- Of servant, see **MASTER AND SERVANT**, 7-9.
- 1. **NEGLIGENCE—DEFECT IN STREET—CONTRIBUTORY NEGLIGENCE IN RIDING HORSE WITHOUT BRIDLE.** It is not as a matter of law such contributory negligence to ride a gentle horse without saddle or bridle as will preclude a recovery for personal injuries sustained in a fall through the horse's shying at a defect in the street. *Helbig v. Grays Harbor Elec. Co.* 190
- 2. **NEGLIGENCE—DANGEROUS PREMISES—POWER HOUSE IN QUARRY—INJURY TO TRESPASSING CHILD.** A power house in a quarry 200 yards from a public road, containing no dangerous machinery or device particularly attractive to children, does not come within the rule of the turntable cases so as to render the owner liable to a trespassing child, six years of age, who was injured in stepping through a hole in the floor of a platform covering the machinery. *Curtis v. Tenino Stone Quarries*..... 355
- 3. **SAME—TRESPASSERS—UNAUTHORIZED INVITATION.** A child six years of age who enters defendant's power house at a quarry, of his own volition, just after being driven away by the engineer in charge, cannot be said to enter upon invitation, but is a trespasser, notwithstanding he may have been enticed there by two boys employed by defendant in manipulating the levers of the hoisting machinery, since they had no authority to invite strangers there, or to impose obligations on the defendant with reference to trespassers. *Id.*..... 355
- 4. **SAME—COMPARATIVE NEGLIGENCE.** The doctrine of comparative negligence does not obtain in this state. *Woolf v. Washington R. & Nav. Co.*..... 491

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEW TRIAL:

For excessive damages, see **MALICIOUS PROSECUTION**, 1.
Granting absolutely or remitting excessive damages, see **DAMAGES**, 2.

NEW TRIAL—CONTINUED.

Motion for, waiver of special appearance, see **APPEARANCE**, 1.

Subsequent judgment on motion for, validity, see **JUDGMENT**, 11, 12.

1. **NEW TRIAL—JURORS—MISCONDUCT.** A conversation between a juror and a deputy sheriff, which has no relation to the case, is not misconduct amounting to ground for a new trial. *State v. Smokalem* 91
2. **NEW TRIAL—DISCRETION—REVIEW ON APPEAL.** Upon granting a new trial solely on the ground that the verdict was excessive, the trial court must exercise its discretion, and the only question on appeal is whether the discretion has been abused. *Wait v. Robertson Mtg. Co.*..... 282
3. **NEW TRIAL—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—EXERCISE OF DISCRETION BY TRIAL JUDGE.** When the trial judge is satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done, it is his duty to grant a new trial, the rules governing the trial and appellate courts being wholly different; and where the trial judge denies a new trial after expressing an opinion at variance with the ruling, he fails to properly exercise his discretion, and the ruling will be reversed on appeal. *Clark v. Great Northern R. Co.*..... 537

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

- Of action or process, see **PROCESS**, 1.
- Of acts involving loss, see **INDEMNITY**, 1, 3, 4.
- Of adverse use, see **HIGHWAYS**, 5.
- Of claim for injuries from defective sidewalk, see **MUNICIPAL CORPORATIONS**, 15.
- Of debts, purchaser of assets of corporation, see **CORPORATIONS**, 5.
- Of execution sale, see **EXECUTION**, 2.
- Of liens, time for filing, see **MECHANICS' LIENS**, 2.
- Of matters material to risk, see **INSURANCE**, 2.
- Of street assessments, see **MUNICIPAL CORPORATIONS**, 12.
- Of outstanding coupon notes, see **ESTOPPEL**, 4.
- To creditors of unrecorded chattel mortgage, see **CHATTEL MORTGAGES**, 3.

NUISANCE:

- Obstruction of navigation, see **WATERS AND WATER COURSES**, 13-15.

OBJECTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 9, 10.
To pleadings, see **PLEADING**, 4-11.

OFFICERS:

Appointment of road supervisors, see **CONSTITUTIONAL LAW**, 5, 6.
Bank officers, see **BANKS AND BANKING**, 1.
Contracting beyond term of office, see **MUNICIPAL CORPORATIONS**, 3.
Corporate officers, fraud of, see **CORPORATIONS**, 3-5.
County officers, vacancy how filled, see **COUNTIES**, 1.
Liability for negligence in performing governmental functions, see **MUNICIPAL CORPORATIONS**, 16-18.

OPINION EVIDENCE:

In civil actions, see **EVIDENCE**, 1.
In criminal prosecutions, see **CRIMINAL LAW**, 9.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**.

ORDER OF PROOF:

At trial, see **TRIAL**, 7.

ORDERS:

Settling accounts of guardian, see **GUARDIAN AND WARD**, 1.

PARENT AND CHILD:

See **GUARDIAN AND WARD**.

1. **PARENT AND CHILD—WRONGS OF PARENT—DAMAGES—ACTION BY CHILD AGAINST PARENT—RAPE.** A minor child cannot maintain an action for damages against a parent for injuries inflicted while the family relation exists, and the fact that the wrong was the heinous offense of rape, for which the father was convicted and imprisoned, does not, in effect, emancipate the daughter or authorize the action. *Roller v. Roller* 242
2. **PARENT AND CHILD—CUSTODY OF INFANT—AGREEMENT TO KEEP FOR SPECIFIED TIME—DISCRETION OF TRIAL COURT.** A father, who is a suitable and capable person, is entitled to the custody of his daughter three years of age, notwithstanding an agreement to leave her with grandparents until she was six years of age, where it appears that he was to pay the grandparents for their services, and that the findings of the court as to his suitability are sustained by the evidence; since the welfare of the child is the paramount consideration, and the trial judge, who observes the witnesses, must exercise his discretion in that behalf. *Carey v. Hertel* 27

PARKS:

See **MUNICIPAL CORPORATIONS**, 1.

PAROL EVIDENCE:

In civil actions, see **EVIDENCE**, 2.

PARTIES:

See **EXECUTORS AND ADMINISTRATORS**, 1.

Amendment to bring in new parties, see **MORTGAGES**, 6, 7.

To appeal, see **APPEAL AND ERROR**, 8, 14, 18.

Capacity of taxpayer to sue, see **COUNTIES**, 2.

Cestuis que trustent, when not necessary to foreclosure, see **MORTGAGES**, 14.

Collateral attack on judgment, see **JUDGMENT**, 1-3.

Foreclosure, see **MECHANICS' LIENS**, 4; **MORTGAGES**, 6-8.

In interest, on vacation of sale, see **EXECUTION**, 2.

Persons concluded by judgment, see **JUDGMENT**, 1-3.

Substitution by stipulation, see **JUDGMENT**, 10.

Substitution without amending pleadings, see **APPEAL AND ERROR**, 10.

Sureties on cost bond, judgment against, see **COSTS**, 2.

Waiver of objection by proceeding against party as owner of trap, see **FISH**, 3.

1. **EQUITY—NOTES.** In an action to cancel a joint note brought by two of the parties whose names purport to be signed thereto, on the allegation that their signatures were forged, the representatives of a third signer, since deceased, are proper but not necessary parties plaintiff. *Ritterhoff v. Puget Sound Nat. Bank.*..... 76
2. **PARTIES—HUSBAND AND WIFE—PERSONAL INJURIES TO WIFE—TRIAL AMENDMENT ADDING HUSBAND AS PARTY PLAINTIFF.** Where a married woman brought an action for personal injuries in her own name, her husband being a necessary party thereto, and a motion to dismiss is made at the trial for defect of parties plaintiff upon the fact of marriage appearing, it is proper under Bal. Code, § 4953, to permit a trial amendment to the complaint, bringing in the husband as a party plaintiff, he being present and consenting, when no claim of surprise or request for a continuance is made, and there is no change in the issues. *Davis v. Seattle.*..... 223

PARTITION:

Action for, see **TENANCY IN COMMON**, 2.

PARTNERSHIP:

1. **PARTNERSHIP—RECEIVERS—APPOINTMENT.** In an action between partners, it is proper to appoint a receiver to take charge of the concern pending the suit, where the preponderance of the evi-

PARTNERSHIP—CONTINUED.

dence establishes the existence of the partnership, which is denied by the defendant, who wrongfully excludes the plaintiff from participating in the management of the firm business, and it is apparent that a dissolution must ultimately be decreed. *Redding v. Anderson* 209

PART PERFORMANCE:

To take agreement out of operation of statute of frauds, see FRAUDS, STATUTE OF, 1-3; LANDLORD AND TENANT, 3; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 1.

PASSENGERS:

See CARRIERS.

PAYMENT:

As part performance, see FRAUDS, STATUTE OF, 3.
Of judgment, effect, see APPEAL AND ERROR, 8.
Of mortgage, assigned coupon notes outstanding, see ESTOPPEL, 4.
Price of land sold, see VENDOR AND PURCHASER, 4-7.
Voluntary, transaction not amounting to, see BILLS AND NOTES, 4.

PEDDLERS:

License of, see MUNICIPAL CORPORATIONS, 6-9.

PERJURY:

Competency of perjured witness, see WITNESSES, 1.
Corroboration necessary, see CRIMINAL LAW, 9-11.

PERSONAL INJURIES:

See NEGLIGENCE, 1-3.
Amendment of pleadings for, see PLEADING, 7.
Excessive damages for, see DAMAGES, 2.
To employe, see MASTER AND SERVANT, 1-9.
To licensee, see RAILROADS, 4, 5.
To passenger, see CARRIERS, 2, 4, 5, 10.
To teamster in fire department, see MUNICIPAL CORPORATIONS 16.
To seamen, see SEAMEN.
To traveler on highway, see MUNICIPAL CORPORATIONS, 15; NEGLIGENCE, 1. At crossing, see RAILROADS, 6-8.
To wife, husband necessary to action, amendment, see PARTIES, 2.

PHYSICAL EXAMINATION:

Of person injured, see DAMAGES, 1.

PLEADING:

- Amendment, see **APPEAL AND ERROR**, 32, 55; **PARTIES**, 2; **MUNICIPAL CORPORATIONS**, 14.
 - Amendment to bring in new parties, see **MORTGAGES**, 6, 7.
 - Answer, admissions in, see **FRAUDS, STATUTE OF**, 2.
 - Conclusion not well pleaded, see **SALES**, 2.
 - Complaint, sufficiency, see **BILLS AND NOTES**, 1; **EXECUTORS AND ADMINISTRATORS**, 1; **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 1-3; **CARRIERS**, 6; **QUIETING TITLE**, 1-3.
 - Failure of proof, see **CONTRACTS**, 5; **WATERS**, 13.
 - For personal injuries, see **MUNICIPAL CORPORATIONS**, 15; **SEAMEN**, 1.
 - For possession of demised premises, see **LANDLORD AND TENANT**, 1, 2.
 - Foreclosure, see **MORTGAGES**, 6, 7, 14, 15.
 - In tort no recovery on contract, see **SEAMEN**, 1.
 - Judgment departing from, see **HIGHWAYS**, 6.
 - Part performance, see **SPECIFIC PERFORMANCE**, 1.
 - Substitution of parties without amendment, see **APPEAL AND ERROR**, 10.
 - To enjoin obstructions, see **WATERS**, 14.
 - Variance, see **MASTER AND SERVANT**, 4, 6; **MORTGAGES**, 15; **MUNICIPAL CORPORATIONS**, 14.
 - Waiver by pleading over, see **APPEAL AND ERROR**, 35, 36.
1. **CONTRACTS—EVIDENCE—PLEADING AND PROOF—CHATTEL MORTGAGES—FORECLOSURE—DEFENSES.** In an action to foreclose a chattel mortgage, a contract tending to show that the plaintiff agreed to pay off the mortgage indebtedness upon the acceptance by him of the title to certain mining property, and other documents having no apparent bearing on the case, are not admissible under an answer alleging that the mortgage was executed to be held in trust by the plaintiff until he should satisfy himself as to the title and rights of a corporation in certain lands, and that the plaintiff had investigated said title and rights, and was satisfied with the same. *Mahoney v. Crockett* 253
 2. **SAME.** In such a case, it is not admissible to prove an agreement for an exchange of securities whereby the notes in suit were to be surrendered and the notes of the corporation to be substituted; since the answer wholly fails to show that the agreement to substitute the corporation notes had been carried out. *Id.*.... 252
 3. **SAME—AMENDMENT OF ANSWER.** In such a case it is proper to refuse to allow an amendment of the answer (except upon terms), to the effect that by the above specified agreements it was agreed that the notes in suit should be cancelled; since the proposed amendment and documents taken together constituted no defense

PLEADING—CONTINUED.

- to the action, in the absence of an allegation that plaintiff accepted the mining properties mentioned therein, or that the substitution of securities mentioned had been carried out. *Id.*..... 252
4. PLEADINGS—AMENDMENT—DISCRETION OF COURT. Error cannot be predicated upon the allowance of an amended complaint in that it changed the cause of action, where the court acted within its discretion in allowing the amendment and the defendants were not misled or prejudiced. *Van Behren v. Rettkowski*..... 247
5. PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. It is not error to allow a trial amendment to conform to the proof by changing a demand on *quantum meruit* to one for a specific sum, where there was no attempt to show prejudice thereby nor a request for a continuance. *Cummings v. Weir* 42
6. PLEADINGS—AMENDMENT TO CONFORM TO THE PROOF—SURPRISE—WAIVER OF ERROR. Error cannot be predicated on the allowance of a trial amendment to the complaint to conform to the proof, in the absence of any claim of surprise or motion for a continuance in the court below. *Helbig v. Grays Harbor Elec. Co.*.... 130
7. PLEADINGS—COMPLAINT FOR PERSONAL INJURIES—CERTAINTY—AMENDMENT—APPEAL AND ERROR—PREJUDICE. The denial of a motion to make a complaint for personal injuries more definite and certain as to an allegation that plaintiff was "otherwise greatly bruised and injured" is not prejudicial error where no evidence was given of injuries other than those particularly described in the complaint and in a trial amendment thereof. *Id.*.. 130
8. PLEADINGS—AMENDMENT TO CONFORM TO PROOF. Where the defendant's demurrer to the complaint is overruled and he stands thereon, the judgment must be limited to the demand in the complaint, and amendments to conform to the proof cannot be made. *State v. Pittenger*. 384
9. PLEADINGS—APPEAL AND ERROR—REVIEW—WAIVER OF DEMURRER. Where a waiver of a demurrer is not aided by the proof, it is immaterial on appeal whether the demurrer was waived or not. *Stein v. Waddell* 634
10. PLEADINGS—COMPLAINT—DEMURRER—LAW OR EQUITY. A demurrer to a complaint asking equitable relief, for want of facts to state a cause in equity, is properly overruled if the complaint states a cause of action upon any theory. *McKay v. Calderwood*. 194
11. PLEADING—DEMURRER—WAIVER BY WITHDRAWING—OBJECTION TO ANY EVIDENCE. The objection that the complaint does not state a cause of action, first raised by demurrer, is waived by the withdrawal of the demurrer and answering on the merits, and cannot

PLEADING—CONTINUED.

be subsequently raised by an objection to any evidence. *Healy v. King County* 184

PLEDGES:

Of contract for sale of land, rescission without tender, see
VENDOR AND PURCHASER, 2.

POLICE POWER:

See CONSTITUTIONAL LAW, 4.
Of municipality, see MUNICIPAL CORPORATIONS, 6-9.

POLICY:

Of insurance, see INSURANCE.

POSSESSION:

In action to remove cloud, see QUIETING TITLE, 1.
Of mortgaged property, see CHATTEL MORTGAGES, 1-3.
Of mortgagee, see MORTGAGES, 3-7, 11, 12.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; ATTACHMENT; COSTS;
CRIMINAL LAW; DAMAGES, 1, 2; EXECUTION; EXTRADITION;
JUDGMENT, 11-13; NEW TRIAL; PARTIES; PLEADING; PROCESS;
TRIAL.

PRESCRIPTION:

Establishment of highways, see HIGHWAYS, 1-9.

PRINCIPAL AND AGENT:

- See BROKERS.
Authority to employ laborer, see CONTRACTS, 9.
Corporate agents, see CORPORATIONS, 1, 2.
Insurance agents, see INSURANCE, 1-3.
Knowledge of agent, see USURY, 1, 2.
1. **PRINCIPAL AND AGENT—DISPUTING AUTHORITY—RATIFICATION.**
Where a railroad company accepts a deed of land purchased for it by an agent, it cannot dispute the agent's authority to agree to pay a consideration additional to that recited as the consideration in the deed. *Windsor v. St. Paul etc. R. Co.* 156

PRINCIPAL AND SURETY:

See INDEMNITY.
Liabilities of sureties on bonds in legal proceedings, see
ATTACHMENT, 3, 4
Sureties as parties to appeal, see APPEAL AND ERROR, 8, 18.

PROCESS:

- On appeal, see **APPEAL AND ERROR**, 16-18.
- Effect of appearance, see **APPEARANCE**.
- Want of service, see **JUDGMENT**, 4-6.

1. **PROCESS—TAXATION—FORECLOSURE OF TAX LIEN—FORM OF SUMMONS.** Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default. *Dolan v. Jones* 176

PROMISSORY NOTES:

- See **BILLS AND NOTES**.

PROPERTY:

- Constructive delivery of goods stored, see **CONTEMPT**, 1.
- Constitutional guaranties of rights of property, see **CONSTITUTIONAL LAW**, 1-3, 7.
- Taking for public use, see **EMINENT DOMAIN**.

PUBLICATION:

- Service of process, see **PROCESS**, 1.

PUBLIC LANDS:

- Contract to locate claims, see **CONTRACTS**, 1, 2.
- Right of way by user, see **HIGHWAYS**, 8, 9.
- 1. **PUBLIC LANDS—SALES—TIMBER ON STATE LAND—SOLD SEPARATELY—STATUTES—CONSTRUCTION.** Laws 1897, pp. 235, 236, §§ 11 and 12, as amended by Laws 1903, p. 103 and Laws 1901, p. 308, requires that the timber on state land shall be sold separately from the land, and that the land shall not be sold, where the timber thereon exceeds one million feet to the quarter section, although that provision of the law is added as an amendment to § 12 which relates solely to applications for the sale of timber and other products exclusive of the land, and the sale was applied for under § 11, relating to applications for the sale of land without any reference to the timber thereon; since § 11 is not an independent act, and must be construed with reference to other parts of the act as now amended, and was impliedly modified by the amendment to section 12. *State ex rel. Houston v. Callvert* 124

PUBLIC MONEY:

- Unlawful expenditure, see **COUNTIES**, 2.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

Of roads, see HIGHWAYS.

PUBLIC WORKS:

Eight hour day upon, see CONSTITUTIONAL LAW, 7.

Unnecessary for prescriptive right, see HIGHWAYS, 1, 2.

QUIETING TITLE:

Bar of judgment, see JUDGMENT, 1, 3.

1. QUIETING TITLE—ACTION TO CANCEL VOID TAX DEED—PLAINTIFF NOT IN POSSESSION. It is error to dismiss an action brought by one out of possession to cancel a void tax deed and judgment, and asking that his title be quieted, since the rule that an action to quiet title cannot be maintained by one out of possession, applies only where the plaintiff has a complete remedy at law, and this is not an action to quiet title within such rule. *Dolan v. Jones*..... 176
2. QUIETING TITLE—PLEADINGS—ANSWER—FORMER ACTION AS A BAR—UNFOUNDED ADVERSE CLAIMS. It is not a valid answer to an action to quiet title, nor a bar to the suit, that the plaintiff had foreclosed a tax certificate and secured a tax deed upon the same property in an action against the same defendant, who made default after personal service, and that the defendant claims no interest or estate acquired since such foreclosure, since the action would lie against prior and unfounded adverse claims, impliedly admitted by such answer, thereby warranting judgment on the pleadings in favor of the plaintiff. *Pease v. Buckley* 182
3. QUIETING TITLE—PLEADINGS—COMPLAINT—SUFFICIENCY AS TO PART OF LOT—DEMURRER. In an action to quiet title to a lot, sold under a tax foreclosure which was alleged to be void, it is error to sustain a general demurrer to the complaint upon its appearing by a bill of particulars that the tax foreclosure was valid, where the tax deed covered only a portion of the lot. *Morrison v. Berlin* 600

RAILROADS:

Carriage of goods and passengers, see CARRIERS.

Enjoining use of street, vacation, see MUNICIPAL CORPORATIONS, 14.

Estoppel to dispute right of way, see ESTOPPEL, 1.

Removal of trespassers from train, see CARRIERS, 3.

1. RAILROADS—BRAKEMEN — AUTHORITY — WANTON EJECTION OF TRESPASSER. A brakeman on a freight train acts within the scope of his authority in ejecting trespassers from the cars, and the

RAILROADS—CONTINUED.

- company is liable for injuries resulting from the wanton and wilful act of the brakeman in so doing in an improper manner while the train is in motion, without evidence showing the brakeman's authority. *Dizon v. Northern Pac. R. Co.*..... 310
2. SAME—EVIDENCE—RES GESTAE. Where a trespasser, a boy, was wrongfully ejected from a train while in motion, his arm being crushed under the wheels, his statement, upon being discovered five minutes thereafter, in great pain and crying, that the brakeman kicked him off the train, is admissible as part of the *res gestae*. *Id.*..... 310
3. SAME—HEARSAY EVIDENCE. In such a case the statement of a stranger who witnessed the accident, made to the witness, is not admissible as part of the *res gestae*, being hearsay. *Id.*..... 310
4. RAILROADS—DEATH OF PEDESTRIAN ON RIGHT OF WAY—TRESPASSER OR LICENSEE—EVIDENCE—SUFFICIENCY—NONSUIT. A pedestrian on a railroad right of way is a trespasser, to whom the company owes no duty as a licensee, in the absence of wilful or wanton neglect, where it appears that she and her family and a few villagers were in the habit of walking upon the track to a post office three-fourths of a mile from her home, that notices were posted along the right of way warning trespassers of the danger of walking thereon, and that there was a public road that might have been taken almost parallel to the railroad, no express license to use the track having been given. *Hamlin v. Columbia & Puget S. R. Co.*..... 448
5. SAME—PEDESTRIAN'S DEAFNESS — CONTRIBUTORY NEGLIGENCE. Where a person is very deaf, she is guilty of gross negligence in walking upon a railroad right of way without keeping a constant lookout for a daily train that had been in the habit of passing her home for years. *Id.*..... 448
6. RAILROADS—NEGLECT—CROSSINGS—TRAVELER FAILING TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE—NONSUIT. A traveler who drives a team upon a railroad crossing at a point where for a considerable distance he had an unobstructed view of an approaching locomotive, is guilty of contributory negligence, as a matter of law, where he drove on to the crossing either without looking or looked and whipped up his horses in an endeavor to cross ahead of the engine. *Woolf v. Washington R. & Nav. Co.*... 491
7. SAME—EVIDENCE—PRESUMPTION AS TO DUE CARE. The presumption that a traveler used due care and stopped to look and listen before driving upon a railroad crossing, cannot be indulged where it appears from the testimony that for a considerable distance he had an unobstructed view of an approaching

RAILROADS—CONTINUED.

locomotive, but drove at a slow walk until within fifty feet or less of the crossing, and suddenly whipped up his horses in an endeavor to cross ahead of the engine. *Id.*..... 491

8. **SAME—DOCTRINE OF "LAST CLEAR CHANCE"** The doctrine that the defendant had the "last clear chance" to avoid killing a traveler, who was struck by a locomotive at a railroad crossing, has no application where the deceased was driving at a slow walk until within fifty feet of the crossing and suddenly whipped up his horses in an endeavor to cross ahead of a locomotive moving at a rate of between 12 and 60 miles an hour. *Id.*..... 491
9. **RAILROADS—ACQUIESCENCE OF LAND OWNER IN CONSTRUCTION—DAMAGES—INJUNCTION—ESTOPPEL.** After acquiescence in the construction and operation of a railroad, the remedy of a land owner is limited to compensation in damages, and he is estopped to enjoin its operation. *Kakeldy v. Columbia & P. S. R. Co.*.... 675
10. **SAME—TRESPASS—DAMAGES NOT RUNNING WITH LAND—SUBSEQUENT PURCHASERS.** Damages to a land owner, by the construction and operation of a railroad by a common carrier possessing the power of eminent domain, are in the nature of compensation for a trespass and do not run with the land, and his grantee takes the land subject to the burden, and cannot enjoin the operation of the road. *Id.*..... 675
11. **SAME—EVIDENCE OF DAMAGE TO SUBSEQUENT PURCHASER.** A party purchasing land after the construction of a railroad thereon, suffers no injury from the fact that the trains were thereafter heavier and the track had been standardized by spreading the rails upon the same ties, no more land being occupied. *Id.*.... 675
12. **RAILROADS—NUISANCE—STREETS—AUTHORITY TO USE—ACQUIESCENCE OF ABUTTING OWNERS—VACATION OF STREET.** An abutting owner who purchased his lot after the vacation of part of the street and the construction there of a railroad track, and acquiesced for years in the operation and improvement of the railroad, cannot object to the operation of the road as a public nuisance, because of want of original authority to use the street, since the street had been vacated, and since the company, as a common carrier, possessed of the right of eminent domain, was under obligation to continue its duties to the public as such. *Id.*.... 675

RAPE:

See **CRIMINAL LAW**, 3, 4.

RATIFICATION:

Of act of agent, see **PRINCIPAL AND AGENT**, 1.

Of unauthorized acts of corporation, see **CORPORATIONS**, 1, 2.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

See **PUBLIC LANDS**, 1.

Action for possession, see **TENANCY IN COMMON**, 1, 2.

Agreement for lease of, see **FRAUDS, STATUTE OF**, 1.

Damages not running with land, see **RAILROADS**, 10.

Material treated as part of, see **ESTOPPEL**, 3.

Mortgagee in possession, see **MORTGAGES**, 3-7, 11, 12.

Possession, as part performance of oral contract, see **FRAUDS, STATUTE OF**, 3.

RECEIVERS:

In actions for dissolution of partnership, see **PARTNERSHIP**, 1.

RECITALS:

Of due service, see **JUDGMENT**, 5.

RECORDS:

Necessity of recording, see **CHATTEL MORTGAGES**, 1.

Of extention of time, see **MORTGAGES**, 1.

1. **RECORDS—COUNTIES—ABSTRACTS OF TITLE—POWER TO EXPEND PUBLIC MONEY IN KEEPING TRACT INDICES.** The legislature having prescribed a system of indices of public transfers, and made it the duty of county auditors to keep the same, the county commissioners have no authority to expend public money in keeping a different system of "tract indices," even when voluntarily done by the auditor's deputies, regardless of their public utility or the fact that money can be saved thereby, since the judgment of the legislature is paramount. *Dirks v. Collin*..... 620
2. **SAME—COUNTY AUDITORS—PUBLIC ABSTRACTERS.** Bal. Code, §§ 417, 418, was not intended to make the county auditor a public abstractor to the extent of requiring him to make a complete list of all transfers affecting particular tracts, and the keeping of "tract indices" is not justified by said statute. *Id.*..... 620

REDEMPTION:

From mortgage, see **MORTGAGES**, 2, 7, 11, 12.

REFORMATION OF INSTRUMENTS:

Of absolute deed, see **MORTGAGES**, 13.

REFORMATORIES:

Right to bail, on commitment to, see **BAIL**, 1.

RELEASE:

- Of attached property by bond, see ATTACHMENT, 5.
- Of chattel mortgage by delay, see CHATTEL MORTGAGES, 2.
- Of mortgage, coupon notes not paid, see ESTOPPEL, 4.

REMITTITUR:

- Of damages, see DAMAGES, 2.

REMOVAL OF CAUSES:

- Petition for, waiver of special appearance, see APPEARANCE, 1.

RENEWAL:

- Of lease, see LANDLORD AND TENANT, 7.

RENT—

- See LANDLORD AND TENANT, 1, 2, 5.
- Rental value on accounting by mortgagee, see MORTGAGES, 11.

REPAIRS:

- As showing termination of tenancy, see LANDLORD AND TENANT, 4.
- Of demised premises, who liable for, see LANDLORD AND TENANT, 6, 7.

REPEAL:

- Of statute, see STATUTES, 1.

RESCISSION:

- Of contract for sale of land, see VENDOR AND PURCHASER, 2, 4-7.

RESERVATION:

- Homicide on, see INDIANS, 1.

RES JUDICATA:

- See JUDGMENT, 1-3.

RETROSPECTIVE LAWS:

- See STATUTES, 2.

REVIEW:

- See APPEAL AND ERROR, 21, 22, 43-54; CRIMINAL LAW, 2, 7.

RIGHT OF WAY:

- See HIGHWAYS.
- For street railway, acquiescence, see ESTOPPEL, 1.

RIPARIAN RIGHTS:

- See WATERS AND WATER COURSES, 13-15.

ROADS:

- See HIGHWAYS.

SALES:

- Of corporate stock and assets, see CORPORATIONS, 3-5.
- Of goods in bulk, see FRAUDULENT CONVEYANCES, 1.
- Of impounded animals, see ANIMALS, 1-3.
- Of realty, see VENDOR AND PURCHASER.
- Of water rights, see WATERS AND WATER COURSES, 1-9.
- On execution, see EXECUTION, 1-3.

1. **SALES—GOOD WILL—ENGAGING IN OPPOSITION BUSINESS—SOLICITING FORMER CUSTOMERS—CONTRACTS.** Where plaintiff's co-partners in a laundry business sold out to him their interests by bill of sale in the usual form, which contained no provisions respecting good will, and no contract to forbear to prosecute the same business, or to solicit patronage, the vendors cannot be enjoined from entering into an opposition business and soliciting the old customers to deal with them, since the rights of the parties are fixed by the terms of the contract. *MacMartin v. Stevens* 616
2. **SAME—PLEADING—COMPLAINT—DEMURRER—FACTS NOT WELL PLEADED.** In an action on a contract of sale of a laundry business, an allegation in the complaint that the good will of the business was the chief consideration, is a mere conclusion of law, in view of the express terms of the contract containing no such provision, and is not admitted by a demurrer. *Id.* 616

SCHEDULE:

- Effect of failure of bankrupt to schedule debt, see BANKRUPTCY, 1.

SEAMEN:

1. **SEAMEN—ACTION FOR PERSONAL INJURIES—COMPLAINT IN TORT—NO RECOVERY ON MARITIME CONTRACT.** In an action by a stevedore on board a boat for personal injuries, based solely upon the tortious negligence of the master, the plaintiff cannot recover as a seaman upon a maritime contract for time lost and expenses. *Lambert v. La Conner Trad. & Transp. Co.* 113

SELF-DEFENSE:

- See CRIMINAL LAW, 7, 21, 22.

SENTENCE:

- In criminal prosecutions, see CRIMINAL LAW, 24.

SEPARATE PROPERTY:

- Bound by joint note, see HUSBAND AND WIFE, 1, 2.

SHIPPING:

See **SEAMEN**.

Contract for building, see **CONTRACTS**, 6.

Stevedore when not a passenger, see **CARRIERS**, 1.

SIGNATURES:

Genuineness, see **BILLS AND NOTES**, 2; **FRAUD**, 1.

SPECIFICATIONS:

Part of contract, see **CONTRACTS**, 6.

SPECIFIC PERFORMANCE:

By vendee having knowledge of defect in title, see **VENDOR AND PURCHASER**, 3.

1. **SPECIFIC PERFORMANCE—COMPLAINT—SUFFICIENCY—VENDOR AND PURCHASER—FRAUDS, STATUTE OF—PART PERFORMANCE OF ORAL SALE.** A complaint for the specific performance of an oral sale of land states a good cause of action in equity where it is alleged that plaintiff entered into the possession of land under an agreement for a half interest, paid part of the purchase price by discharging outstanding claims, expended labor thereon for a term of years, adding valuable improvements thereto, paid out money to release obligations against the land, and tendered the balance of the purchase price, since the elements of a constructive fraud are present in such part performance; and especially where it is alleged that the defendant is insolvent, since the plaintiff could not be replaced in his original position or adequately compensated in damages. *McKay v. Calderwood*..... 194

STATE LAND COMMISSIONERS:

Appeal from, review, see **APPEAL AND ERROR**, 54.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 21, 22.

STATES:

Legislative power, see **CONSTITUTIONAL LAW**, 5, 7.

Right to fix eight hour day on public works, see **CONSTITUTIONAL LAW**, 7.

Public lands, see **PUBLIC LANDS**, 1.

STATUTES:

Statute of frauds, see **FRAUDS, STATUTE OF**.

Statute of limitations, see **LIMITATION OF ACTIONS**.

Construction, see **APPEARANCE**, 1; **ATTACHMENT**, 5; **CRIMINAL**

STATUTES—CONTINUED.

LAW; HIGHWAYS, 1, 2, 8, 9; JURY, 1; LIMITATION OF ACTIONS, 1, 2; MECHANICS' LIENS; PUBLIC LANDS, 1-3.

As to trap location, construction, see FISH, 2.

Bulk stock laws, see FRAUDULENT CONVEYANCES, 1.

Laws interfering with liberty to contract, see CONSTITUTIONAL LAW, 1-3, 7.

Requiring acceptance in writing, construction, see BILLS AND NOTES, 1.

1. **STATUTES—TITLE OF ACT—CONFLICT IN LAWS.** The title to the act providing for the levy of road and poll taxes, and for road districts and the appointment of supervisors thereof (Laws 1903, p. 223), being sufficient to authorize such appointments, an objection that it is insufficient to embrace the repeal of former laws providing for the election of supervisors, is immaterial upon the question of the validity of an appointment, since the appointment could be made if the former law was not repealed. *State ex rel. Griffith v. Newland*..... 428

2. **STATUTES—RETROSPECTIVE EFFECT—EJECTMENT—BONA FIDE OCCUPANTS—ALLOWANCE FOR VALUE OF IMPROVEMENTS—MISTAKE IN BOUNDARIES.** Laws 1903, p. 262, for the protection of bona fide occupants of land who have, in good faith, made permanent improvements, has no retrospective effect, and cannot be taken advantage of by a defendant in ejectment who, by mistake in 1900, built the brick wall of his building upon plaintiff's adjoining lot; since at that time he was, at common law, a trespasser, and the rights of plaintiff then became vested. *Investment Co. v. Hambach* 629

STOCK:

Corporate stock, see CORPORATIONS, 3-5.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 3-5.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.

Estoppel to dispute right of way, see ESTOPPEL, 1.

Grant of franchise, see MUNICIPAL CORPORATIONS, 4, 5.

STREETS:

See HIGHWAYS.

Acquiescence in use of, see ESTOPPEL, 1; RAILROADS, 9, 12.

Personal injuries to travelers, see MUNICIPAL CORPORATIONS, 15; NEGLIGENCE, 1.

Vacation of, see MUNICIPAL CORPORATIONS, 14.

SUBROGATION:

Of amount due on bond to payment of labor claims, see **INDEMNITY**, 5.

SUNDAY:

Contract to pack fish, Sunday excluded, see **CONTRACTS**, 4.

SUPERSEDEAS:

On appeal, see **APPEAL AND ERROR**, 19.

TAXATION:

Action to cancel deed, see **QUIETING TITLE**, 1-3.

Inheritance tax, amount chargeable, see **WILLS**, 1.

Injury to taxpayer by unlawful expenditure, see **COUNTIES**, 2.

Interest on taxes paid, see **MORTGAGES**, 10.

Of peddlers by license, see **MUNICIPAL CORPORATIONS**, 6-9.

Summons in foreclosure of liens, see **PROCESS**, 1.

1. **TAXATION—FORECLOSURE OF LIEN—JUDGMENT—PARTIES—STRANGER AND UNKNOWN OWNERS.** Where taxes were assessed to unknown owners, a judgment foreclosing a tax certificate of delinquency in a proceeding instituted against one S and unknown owners, is not invalid because S was a stranger to the record, since it would have been valid against unknown owners alone, where the property was assessed to unknown owners. *Morrison v. Shipman*..... 171
2. **TAXATION—EXCESSIVE LEVY—POWER OF COURTS TO REDUCE.** Where it appears that the plaintiff's property was not only assessed at a gross overvaluation many times its value, but higher proportionally than other property, the trial court properly set the assessment aside as excessive, and reduced the amount to a just sum. *Henderson v. Pierce County*..... 201
3. **TAXATION—APPEAL—TIME FOR TAKING IN TAX LIEN FORECLOSURE PROCEEDINGS—VACATION OF JUDGMENT.** An appeal from an order denying a motion to vacate a tax foreclosure judgment must be taken within thirty days (Fullerton, J., dissenting). *Pedigo v. Fuller* 529
4. **SAME—UNIFORMITY OF TAXATION.** The rule requiring uniformity in taxation does not apply to a license upon trades or occupations, since the same is not a tax on property. *In re Garfinkle*... 650

TENANCY IN COMMON:

1. **INJUNCTIONS—POSSESSION OF EQUITABLE TENANT IN COMMON—PAYMENT OF PROPORTION OF PURCHASE PRICE—ACTION ON BONDS.** Parties who are entitled to become tenants in common of a mineral vein, upon payment of their proportion of the purchase price,

TENANCY IN COMMON—CONTINUED.

have only an inchoate right to possession, and an injunction ousting them is not wrongful in the absence of tender of payment by them, and does not become wrongful by subsequent payment, so as to give rise to any action upon the injunction bond. *Yarwood v. Cedar Canyon Consol. Min. Co.*..... 56

2. **COTENANCY—IMPROVEMENTS—WHEN NOT CHARGED AGAINST COTENANT—OTHER LAND IN LIEU OF IMPROVED LOTS.** In an action by a tenant in common to recover a half interest in real estate, deed for which was held by the co-tenants under a claim that plaintiff's interest was only in the nature of a loan, the defendants are not entitled to charge the land with the value of their improvements, where the plaintiff's testimony was undisputed that it had been agreed that plaintiff was to deed the defendants the improved lots and receive an equal quantity of land in lieu thereof, and judgment should be entered for such division. *Minder v. Mottaz* 474

TENDER:

Of deed, see **VENDOR AND PURCHASER**, 2, 4-6.

TIDE LANDS:

After-acquired title passes under covenants of seizin and warranty, see **DEEDS**, 1.
Contest, review, see **APPEAL AND ERROR**, 54.

TIMBER:

See **LOGS AND LOGGING**.
Sale of, on state lands, see **PUBLIC LANDS**, 1.

TIME:

As essence of contract for sale of realty, see **VENDOR AND PURCHASER**, 2-4.
For taking appeal, in tax foreclosure, see **TAXATION**, 3.

TITLE:

Judicial sale of forfeited leasehold, see **LANDLORD AND TENANT**, 5.
Power of county to keep tract indices, see **RECORDS**, 1, 2.
Removal of cloud, see **QUIETING TITLE**.
Statutes, see **STATUTES**, 1.

TORTS:

See **FRAUD ; MALICIOUS PROSECUTION**, 1; **NEGLIGENCE**.
Action by child against parent, see **PARENT AND CHILD**, 1.
Action in tort or contract, see **SEAMEN**, 1.

TOWNS:

See **MUNICIPAL CORPORATION**

TRESPASS:

By construction of road, see **RAILROADS**, 10-12.

Injuries to trespassers, see **RAILROADS**, 4, 5.

Personal injury to child, see **NEGLIGENCE**, 2, 3.

Ejection from train, see **CARRIERS**, 3; **RAILROADS**, 1-3

TRIAL:

See **CRIMINAL LAW**, 12-24; **NEW TRIAL**.

Admissions, see **APPEAL AND ERROR**, 33.

Argument of counsel, see **APPEAL AND ERROR**, 40.

Discretion of court on granting new trial, see **NEW TRIAL**, 2.

Discretion of court on physical examination, see **DAMAGES**, 1.

Exceptions for purpose of review, see **APPEAL AND ERROR**, 11-13.

Review of findings and verdicts on appeal, see **APPEAL AND ERROR**, 43-53.

Review of instructions on appeal, see **APPEAL AND ERROR**, 37-39.

Opinion of counsel, see **CRIMINAL LAW**, 15-18.

Right to trial by jury, see **JURY**, 1.

1. **DAMAGES—VERDICT—EXACT AMOUNT TENDERED.** No inference can be drawn against sustaining a verdict for the value of land because the same is in the exact amount tendered, where the court instructed the jury that, by reason of said tender, no less amount could be allowed. *Lincoln County v. Brock*..... 14
2. **TRIAL—COMMENT ON FACTS—APPEAL—REVIEW—CURING ERROR BY INSTRUCTIONS.** Where the plaintiffs had pleaded on a *quantum meruit* and the proof showed an express contract, it is not reversible error that the court, during the progress of the trial in interrogating counsel concerning the relation of the pleadings to the evidence, unlawfully commented on the facts by stating that the proof clearly showed an express contract, where the error was subsequently cured by full instructions as to the province of the jury alone to determine the existence of the contract. *Cummings v. Weir*..... 42
3. **TRIAL—EXCLUDING WITNESSES FROM ROOM—WAIVER OF REQUEST.** Where the defendant does not insist upon his request to exclude the witnesses from the court room, but leaves it "optional with the court," error cannot be predicated upon the court's failure to exclude them. *State v. Armstrong*..... 51
4. **SAME—INSTRUCTIONS TO JURORS INDIVIDUALLY.** It is not error to refuse instructions addressed to the jurors individually, and not to the jury as a body. *Id.*..... 51

TRIAL—CONTINUED.

5. SAME—INSTRUCTIONS—RELEVANCY. It is not error to refuse instructions having no special application to the case upon points sufficiently covered in the general charge. *Id.*..... 51
6. TRIAL—ASSIGNMENT—DISCRETION OF COURT—REVIEW. The manner of assigning a case on the trial docket is within the discretion of the trial court, and not to be reviewed except for abuse thereof. *State v. Brown* 106
State v. Sexton..... 110
7. TRIAL—NONSUIT—RE-OPENING CASE. It is discretionary to reopen a case for further evidence after the state has rested and a motion for a nonsuit is about to be granted, and error cannot be predicated thereon in the absence of abuse of discretion. *State v. Sexton* 110
8. TRIAL—INSTRUCTIONS—STATEMENT OF ISSUES. It is not error that the instructions to the jury were not prefaced by the usual statement of simple issues formed by the pleadings. *Lambert v. La Conner Trad. & Transp. Co.*..... 113
9. INSTRUCTIONS—CLEARNESS—REASONABLY DEFINITE. Error cannot be predicated upon instructions in that they were not simple, direct and clear upon the principal issue, where there were various issues requiring instruction, and they were reasonably clear and definite and not misleading to the ordinary mind, although not the most simple and direct that might be given. *Carson v. Old Nat. Bank*..... 279
10. TRIAL—EQUITY—ADVISORY VERDICT—HARMLESS ERROR. The finding of a jury in an equity case is advisory, and any error in calling the jury is immaterial, where the court made findings supported by the evidence independently of the verdict. *Lauman v. Hooper* 382
11. TRIAL—NONSUIT IN EQUITY—WAIVER. The defendant waives a motion for nonsuit in an equity case by proceeding with the trial. *Gilmer v. Holland Investment Co.*..... 589
12. TRIAL—NONSUIT—ERROR CURED BY INTRODUCTION OF EVIDENCE—BROKER'S COMMISSIONS. In an action by a broker for commissions, in which a motion for a nonsuit did not particularly point out that the plaintiff had failed to prove the allegation that defendant had agreed to pay the usual commission of five per cent, error in overruling the nonsuit is cured by the defendant's proceeding with the case and introducing evidence that the usual commission was five per cent. *Elmendorf v. Golden*..... 664

TROVER AND CONVERSION:

Conversion by mortgagee, see CHATTEL MORTGAGES, 2.

TRUSTS:

Conveyance of fee for creditors, see **MORTGAGES**, 14.

UNLAWFUL DETAINER:

See **LANDLORD AND TENANT**, 1, 2.

USURY:

1. **INTEREST—USURY—DEDUCTIONS FOR COMMISSION—PRINCIPAL AND AGENT.** Under Bal. Code, §§ 3669, 3671, prohibiting interest in excess of twelve per cent, either directly or indirectly, and providing that the principal shall be held for the acts of any person contracting therefor, a note is usurious where brokers loaned the money of the principal and deducted a sum by way of commissions in excess of the legal interest; and the fact that the principal did not authorize such acts or derive any benefit from the commissions is immaterial. *Ridgway v. Davenport*..... 134
2. **BILLS AND NOTES—USURY—BONA FIDE PURCHASER—AGENT'S KNOWLEDGE—EVIDENCE—SUFFICIENCY.** Where the defense of usury is interposed to a note secured by chattel mortgage, valid on its face, and purchased by the agent of plaintiff, who claims as an innocent purchaser, the burden of proof being upon the defendants, it is not sufficient evidence of knowledge on the part of the agent of the usurious character of the note that he instituted a statutory foreclosure in the name of the payee as plaintiff, and only substituted the plaintiff as the party in interest upon the defendants' bringing the foreclosure into court; since the knowledge of the payee was not knowledge of the agent, and making the payee plaintiff might have been through a misconception of the law, and was not necessarily a suspicious circumstance. *Haynes v. Gay*..... 230

VACATION:

See **EXECUTION**, 1-3.

Foreclosure sale, see **MORTGAGES**, 6, 7.

Of judgment, see **JUDGMENT**, 4-12.

Of streets, see **MUNICIPAL CORPORATIONS**, 13, 14

VARIANCE:

Between pleadings and proof in civil action, see **PLEADING**, 1-3;
MASTER AND SERVANT, 4, 6; **MORTGAGES**, 15; **MUNICIPAL CORPORATIONS**, 14.

VENDOR AND PURCHASER:

Advance, conditional sale, see **MORTGAGES**, 13.

Damages for trespass, see **RAILROADS**, 11, 12.

Purchasers at sale on execution, see **EXECUTION**, 2, 3.

VENDOR AND PURCHASER—CONTINUED.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 3.
Specific performance of contract, see SPECIFIC PERFORMANCE.

1. VENDOR AND PURCHASER—FRAUDS, STATUTE OF—EXECUTION OF VERBAL PROMISE TO CONVEY LAND—PART PERFORMANCE—VESTING TITLE—ATTACHMENT. Where parents outfitted their son for Alaska, he being without means and in debt, and paid off his debts amounting to several hundred dollars, under the verbal promise that, if his venture was successful, he would, out of his first earnings, purchase and present them a farm for a permanent home, and in pursuance thereof, upon returning with \$5,000, he purchased a farm, taking a deed in his own name, and placed his parents in possession, delivering them the deed, and agreeing to execute a deed to them, the transaction is not a gift, but amounts to an executed contract of sale, with the purchase price paid, and there is such a part performance as to take the case out of the operation of the statute of frauds, and vest in the parents all except the bare legal title to the property, so that the same would not be subject to attachment for the debts of the son subsequently contracted. *Lee v. Wrison*..... 47
2. VENDOR AND PURCHASER—CONTRACT TO PURCHASE LANDS—DEFAULT IN PAYMENT—TIME OF ESSENCE—RESCISSION—PLEDGES—CONTRACT PLEDGED AS SECURITY—CONSENT OF PLEDGEE TO RESCIND. Where a contract for the sale of land makes time of the essence thereof, and the vendor, after pledging the contract as security for a loan, commences an action for a rescission for non-payment of the amount due, plaintiff is not entitled to rescind upon the strict terms of the contract making time of the essence without the consent of the pledgee or without giving him an opportunity to perform the contract. *Shaw v. Benesh*..... 457
3. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—FAILURE OF TITLE—KNOWLEDGE OF VENDEE BEFORE SUIT—EQUITY—JURISDICTION. A purchaser of lands cannot maintain an action in equity for specific performance, or for damages in case specific performance cannot be had, where he knew, before the action was commenced, that the vendor could not perform the contract for want of title, since equity will not exercise jurisdiction where the remedy of damages is all that can be decreed. *Peters v. Van Horn* 550
4. VENDOR AND PURCHASER—CONTRACT OF SALE—CONSTRUCTION—MUTUAL AND DEPENDENT COVENANTS—ACTION FOR FORFEITURE—TENDER OF CONVEYANCE. The covenants, in a contract of sale of real estate, on the part of the vendors to convey the property and take back a mortgage upon the payment of the second installment and on the part of the vendees to make such payment, are

VENDOR AND PURCHASER—CONTINUED.

mutual, concurrent and dependent, although the contract provides that the vendees "shall first pay," and time is made of the essence of the contract; and no action to declare a forfeiture of the contract, for nonpayment of the installment, can be maintained by the vendors without executing and tendering a deed. *Stein v. Waddell* 634

5. SAME—INCUMBRANCES CREATED BY VENDEE—EXCUSE FOR FAILURE TO TENDER CONVEYANCE. Where the mutual covenants in a contract of sale obligate the vendor to tender a conveyance by warranty deed, before declaring a forfeiture for nonpayment of the purchase price, incumbrances created by the vendee after the sale do not constitute a breach of the warranty, nor excuse the vendor from making the tender. *Id.*..... 634
6. SAME—FORFEITURE FOR NONPAYMENT OF PRICE—ACCEPTANCE OF PARTIAL PAYMENT—FAILURE TO TENDER DEED—EQUITY. Where \$5,000 was paid down on the purchase price of land, sold for \$20,000, and six weeks after the second installment of \$5,000 fell due, the vendors accepted partial payment of the same, and three weeks thereafter the vendors sued for a forfeiture without making a tender of the conveyance agreed upon in the contract upon payment of the second installment, equity should insist upon a strict compliance with the contract by the vendors, and the action will be dismissed. *Id.*..... 634
7. VENDOR AND PURCHASER—COVENANT TO PAY TAXES AND IMPOSITIONS—DEBTS OF VENDEE—BREACH OF CONTRACT. The agreement by vendees under a contract of sale to pay all taxes and impositions against the property is limited to charges against the interests of the vendors, and is not a covenant to pay their own debts, so as to make liens against, or an execution sale of, the vendees' interests a breach of the contract of sale. *Id.*..... 634

VERDICT:

Limited by tender, see TRIAL, 1.

Review on appeal, see APPEAL AND ERROR, 43-46.

Setting aside, see NEW TRIAL, 3.

WAIVER:

See APPEARANCE; ESTOPPEL.

Error waived in appellate court, see APPEAL AND ERROR, 35, 36, 39.

Of certificate of architects, see CONTRACTS, 7, 8.

Of damages, see INDEMNITY, 3.

Of lien, see MECHANICS' LIENS, 1.

WAIVER—CONTINUED.

Of notice, petitioning for local improvements, see **MUNICIPAL CORPORATIONS**, 10-12.

Of objections, see **PLEADINGS**, 9-11; **TRIAL**, 3, 11.

WARDS:

See **GUARDIAN AND WARD**.

WAREHOUSEMEN:

Constructive delivery under order of court, see **CONTEMPT**, 1.

WARRANTY:

Passing after-acquired title, see **DEEDS**, 1.

WATERS AND WATER COURSES:

1. **WATERS—DIVERSION OF—RIGHT OF WAY—DEED—GRANT—LICENSE.** An instrument executed as a deed purporting to grant and convey a right of way for a water pipe line, and also the right to divert the flow of water in a certain creek, operates as a grant as in the case of land itself, and is not a license, terminable at will. *Everett Water Co. v. Powers*..... 143
2. **SAME—DEED—CERTAINTY—TIME LIMIT FOR DIVERSION.** Such a deed is not void for uncertainty in that it fails to fix any time limitation for the diversion of the water, but will be construed as unlimited as to time. *Id.*..... 143
3. **SAME—CERTAINTY AS TO LOCATION.** Such a deed is not void for uncertainty in failing to locate the right of way, where entry on the tracts described was made, and a route selected and marked out, and work commenced with the intention of using the strip. *Id.*..... 143
4. **SAME—CERTAINTY AS TO AMOUNT OF WATER.** Such a deed is not void for uncertainty as to the amount of water to be diverted where the grant covers all the water except an express reservation for all that one family may need for domestic purposes on a certain forty-acre tract, and in case of fire to the extent of service through a three-inch pipe. *Id.*..... 143
5. **SAME—CERTAINTY AS TO RESERVATIONS OF WATER.** Such a deed is not void for uncertainty as to how the reserved water was to be taken, since no pipe being specified except for fire, it follows that water for domestic purposes was to be taken from the bed of the stream. *Id.*..... 143
6. **SAME—CERTAINTY AS TO WIDTH OF RIGHT OF WAY.** Such a deed is not void for uncertainty in failing to specify the width of the right of way, since in such case the width would be only such as shall be reasonably necessary. *Id.*..... 143

WATERS AND WATER COURSES—CONTINUED.

7. **SAME—DEED NOT AFFECTED BY RIGHTS OF LOWER RIPARIAN OWNERS.** A deed of the right to divert the waters of a stream cannot be objected to by successors in interest of the grantor because of the fact that the rights of lower riparian owners had not been acquired. *Id.*..... 143
- 8.* **SAME—FRAUD IN PROCURING DEED—PURPOSES FOR WHICH WATER IS TO BE USED.** A deed of the right to divert water from a stream for "water purposes at the town of L," is not void for fraud in that it was intended to use the same for a new city to be founded in the vicinity, the name of which was not then determined, where it appears that such intention was made known to the grantor, that the vicinity was known as L, then the nearest postoffice, and water is to be supplied to what is still called L. *Id.*..... 143
9. **SAME—SPECIFYING PURPOSE—SURPLUS.** Where a deed grants all the water of a stream, except certain reservations, specifying that the diversion was for "water purposes at the town of L," without any words of prohibition against the use of water for other purposes, the grantee is entitled to use the surplus water, after supplying the town of L, for supplying another city. *Id.*..... 143
10. **SAME—ABANDONMENT OF RIGHT OF WAY—NON-USER—PRIOR LEASE—LIMITATION OF ACTIONS—WHEN COMMENCES TO RUN.** Where the owner of the fee grants a right of way for a pipe line across lands subject to a prior lease, and the lessee enjoins any use thereof, the statute of limitations against the grantee upon a non-user of the right of way does not begin to run until the expiration of the lease, and, where only six years had elapsed since that time, the right to use the right of way was not abandoned or lost by non-user; since no non-user for any length of time short of the period of the statute of limitations would constitute an abandonment, when no time is fixed. *Id.*..... 143
11. **SAME—DIVERSION OF WATER—INJUNCTION TO RESTRAIN INTERFERENCE.** Injunction is the proper remedy to restrain interference with the right to divert the waters of a stream and to use a pipe line right of way, granted to the plaintiff by the predecessors in interest of the defendants, who deny the plaintiff's right and threaten interference with the enjoyment thereof. *Id.*..... 143
12. **SAME—INJUNCTION PENDING CONDEMNATION PROCEEDINGS.** In an action to enjoin a land owner from interfering with a water company's use of a right of way for a pipe line to supply the inhabitants of a city with water, where it appears that a portion of the route departs from the company's granted right of way, it is proper to grant an injunction as to such new part of the route for thirty days to enable the company to institute condemnation

WATERS AND WATER COURSES—CONTINUED.

proceedings, and to make the same permanent if the proceedings are diligently prosecuted. *Id.*..... 143

13. **WATERS—RIPARIAN RIGHTS—INJUNCTION AGAINST FLOODING—EVIDENCE—FAILURE OF PROOF.** In an action brought by a lower riparian owner to recover damages for the flooding of plaintiff's land, the complaint stating also a second cause of action for an injunction against the maintenance of a dam, in which the cause of action for damages was submitted to a jury, there is a total failure of proof as to the second cause of action for an injunction, and the same is properly dismissed, where said cause was submitted to the court upon the testimony introduced at the jury trial, which was confined to the injuries already received, without proof that the dam is still maintained or that the injury will be repeated in the future. *Bryant v. Lamb Timber Co.*..... 168
14. **WATERS—OBSTRUCTION OF NAVIGABLE SLOUGH—FLOATING OF LOGS TO MARKET—DELAY—DAMAGES—ITEMS RECOVERABLE—PLEADING—COMPLAINT—SUFFICIENCY.** In an action for damages for the obstruction of a navigable slough by the storage of logs therein, where it was alleged generally in the complaint, that the plaintiffs were prevented from putting their logs therein and bringing them to market, and were put to great delay and expense and prevented from using their logging engine and keeping their men employed, to their damage in the sum of \$500, and \$25 per day thereafter, it is proper, in the absence of a demand for a bill of particulars or motion to make more definite, to receive evidence that plaintiffs' logging engine and crew of men were idle for a certain period, and that the crew was discharged and another hired at a higher rate of wages; since the complaint sufficiently covers such items of damage, and the obstruction was the natural and proximate cause thereof. *Creech v. Humptulips Boom etc. Co.*..... 170
15. **SAME—REMOVAL OF OBSTRUCTIONS—DENIAL OF RIGHT—MEASURE OF DAMAGES—INSTRUCTIONS.** In an action for damages for the obstruction of a navigable slough by the storage of logs therein, where the defendant denied that the same was navigable or a public highway, claiming the right to use and obstruct the same under a lease from abutting owners, it is proper to deny the defendant's request for instructions to the jury to the effect that, if the plaintiffs could have removed the obstructions without a breach of the peace, the measure of their damages would be the cost of such removal and damages for the delay during the time reasonably necessary to remove the same. *Id.*..... 172

WAYS:

Public ways, see **HIGHWAYS.**

WILLS:

1. **WILLS—INHERITANCE TAX—EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATION—COMITY—JUDGMENTS—CONCLUSIVENESS OF DISTRIBUTION—INHERITANCE TAX CHARGEABLE TO LEGATEES.** Where a resident of the state of Maine died, leaving estate there and in the state of Washington, and his will was probated there, and all legacies to collateral heirs and strangers to the blood and all the debts were, by order of the probate court in Maine, paid out of the estate situated in that state, leaving the property in this state to be divided between his widow and son under the residuary clause in the will, the estate in the state of Washington is not chargeable with the increased inheritance tax upon legacies to collateral heirs and strangers to the blood at the rate of 3 and 6 per cent, under Laws 1901, p. 67; since comity requires that full faith and credit be given to the proceedings in the probate court in Maine, ordering those legacies to be paid out of the estate within its jurisdiction and under its control, and such order is conclusive on the courts of this state; and since the inheritance tax is to be deducted from the legacies and paid by the legatees, and the executor in this state has no opportunity to collect the same from the legatees chargeable therewith. *In re Clark's Estate* 671

WITNESSES:

- Excluding from court room, see TRIAL, 3.
 Indorsement of names of, on indictment, see CRIMINAL LAW, 14.
 Opinion, see EVIDENCE, 1.
 Perjury, corroboration, see CRIMINAL LAW, 10, 11.
1. **WITNESSES—COMPETENCY—CONVICTION OF PERJURY.** A witness convicted of cattle stealing, who acknowledges upon cross-examination that he committed perjury, is not incompetent by reason of Bal. Code, § 5992, providing that a person convicted of perjury shall not be a competent witness in any case. *State v. Pearson* 405

WORK AND LABOR:

- See CONSTITUTIONAL LAW, 7.
 Liens for work and materials, see MECHANICS' LIENS.

WRITS:

- See EXECUTION, 1-3; MANDAMUS; PROCESS.

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